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ABSTRACT

During the two-year period 1979-80, the National Congress on Church-Related Colleges and Universities operated as a cooperative effort of 23 denominations to examine the issues facing their institutions of higher education. The significant papers and a record of events appear in this and three other volumes. In this volume the contents include three sections containing papers. Section One, on legal issues, contains: Introduction and overview (J. Victor Hahn); Legal Issues for Church-Related Colleges and Universities (Philip R. Moots); Delivery of Legal Services (Kent M. Weeks); Legal Status of Independent Colleges and Universities (Edward M. Gaffney, Jr.); Constitutional Protections for Independent Higher Education: Limited Powers and Institutional Rights (W. Cole Durham, Jr., Dallin H. Oaks); Preventive Law for the College or University (Roger E. Bloomfield). Section Two, on public policy issues, contains: Public Policy Principles (John W. Frazer, Eric C. Watters); Constitutional and Legal Considerations (J. Victor Hahn); The Church, the Church-Related Colleges, and the Struggle for Justice (George N. Rainsford). Section Three addresses financial issues: Financial Conditions and Trends of Church-Related Colleges (John Minter); Patterns of Church Membership, Giving, and Support of Higher Education (James M. Unglaube); Conversations About College Management in the Year 2000 (Ivan E. Frick). (MSE)

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CHURCH AND COLLEGE: A VITAL PARTNERSHIP

Volume 3: Accountability - Keeping Faith With One Another

A Publication of
The National Congress on Church-Related
Colleges and Universities

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INTRODUCTION

For the two-year period 1978-1980 the National Congress on Church-Related Colleges and Universities has been a cooperative effort of twenty-three denominations to examine the issues facing their institutions of higher education. Literally hundreds of people have been involved – nationally recognized church leaders and educational scholars, denominational executives and college officials, lay members of congregations and constituents of colleges, and many others representing a cross-section of those concerned about church-related colleges and universities.

The participants have faced their task in a variety of ways. They have held two national meetings, one at the University of Notre Dame in June 1978 and one in Washington, D.C. in February 1980. They have worked through Study Commissions to address particular issues in depth. And they have, through their individual denominations, designed plans of action to reach out to the broad spectrum of church members and constituents of church-related colleges and universities.

To capture the substance of all the work carried out during the last two years, the National Congress is issuing a set of publications – Church and College: A Vital Partnership – containing the significant papers and a record of events. There are four volumes in this series of publications

1. *AFFIRMATION – A Shared Commitment for Creative Renewal.* This volume is a summary of the main work thrust of the National Congress. It contains Affirmations about the value and contribution of the church-related college, Action Plans to renew the colleges' ability to face the issues of the future, and an Inventory for Renewal to help colleges and churches alike continually assess their status. This volume also contains a brief description of all National Congress activities and processes, including excerpts from speeches at the two national meetings.

2. *MISSION – A Shared Vision of Educational Purpose*

3. *ACCOUNTABILITY – Keeping Faith with One Another.* These two companion volumes contain the papers developed by the six Study Comissions of the National Congress. The papers cover the six areas of educational purposes and

programs, issues of society, relationships between churches and colleges, legal issues, public policy issues, and financial issues. In each area the papers attempt to define the issues and to identify options for churches and colleges to deal with the issues. Also, an overview statement appears at the first of Volume 2. It describes the general framework of church-related colleges and is the base from which the Study Commissions delved into their areas of specific issues. Having the overview eliminated the need for each Commission to repeat basic conditions and provided a common predicate from which all began their work.

These papers are significant in themselves, but they have also served other useful functions for the National Congress. For the Notre Dame meeting, they were the basis of discussion sessions and the means to acquaint many individuals with the issues concerning church-related colleges. For the Washington meeting, they were the primary resource from which the meeting's documents were drawn – the Affirmations, Action Plans, and Inventory for Renewal. Through the development and discussion of the Affirmations, Action Plans, and Inventory, the National Congress synthesized the papers of all six Commissions and brought focus to its overall work. That kind of integrating statement would not have been possible, however, without the original sources to draw upon.

4. *EXCHANGE – Sharing Resources for Renewal.* This volume contains information of two kinds: first, a bibliography of recent books and published articles about church-related higher education, and second, a bibliography of materials on church-related higher education available through denominations and colleges. This volume is perhaps the most extensive bibliography on church-related higher education.

The participants in the National Congress on Church-Related Colleges and Universities hope that these publications are both a contribution to the study of higher education and a resource that helps church-related colleges and college-related churches face the future with vitality and purposefulness.

SECTION I
Legal Issues

Chapter 1

INTRODUCTION AND OVERVIEW TO LEGAL ISSUES

J. Victor Hahn

Today, in our increasingly litigious society, church-related higher education is facing a new and rapidly developing legal environment. Higher education, particularly independent and church-related education, must come to terms with this environment.

In a sense, the problems of higher education should be viewed in the context of the voluntary, charitable sector generally. Increasing calls for accountability can be observed for all charitable institutions. Among the legal changes which have recently emerged as part of this trend are the erosion of the charitable immunity doctrines in various states, challenges to the special tax advantages and exemptions traditionally held by charitable institutions, and increasingly stringent requirements imposed on charitable solicitation.

In addition, questionable activities of some self-styled "religious" groups have created serious public relations problems for churches and their related institutions. There has been substantial media coverage in recent months about a number of such activities, including mail order ordinations, questionable money raising techniques, misappropriation of charitable donations, and misuse of tax-exempt status by various groups.

Such changes in the social perception of what it means to be a charitable or a religious organization can have a profound impact upon public policy and the legal status of church-related colleges. This may take the form of increasing pressure for legal accountability and government regulation as well as a greater readiness on the part of private individuals to seek legal redress for their quarrels with colleges. For these and other reasons the legal environment of higher education has changed dramatically in the last decade.

Higher education, traditionally immunized from much of the business of litigation, has in recent years been swept into the legal process. The filing of complaints with regulatory agencies and of lawsuits in the courts by students, faculty, and staff are now becoming commonplace. Notwithstanding merits or importance of the social policy underlying specific statutory and regulatory provisions, government agencies are sometimes overzealous and inconsistent in their investigation and enforcement activities. The courts as well have opened themselves to review claims and suits brought against colleges and in many instances are less willing than before to protect and insulate from legal liabilities the judgments and customs of academia.

A consequence of these developments is that higher education law is emerging as a legal specialty. The body of case law which outlines the legal framework for colleges is sizable and growing rapidly. Plaintiffs and the government in suits and complaints against colleges often utilize legal counsel with considerable experience and expertise in the particular areas of higher education law.

On the other hand, small independent colleges, often represented by local counsel who are general practitioners, have all too often struggled through precedent-setting litigation without the support or assistance of other members of the higher education community, even though the stakes of litigation were of considerable significance for all of independent higher education or of church-related higher education.

Another factor in the developing legal framework of colleges has been the growing tendency – triggered by overloaded and backlogged administrative dockets – to stress informal reconciliation of complaints. This tendency could well translate into a situation in which colleges will be pressured to settle more and more complaints out of court. Of course, out-of-court settlement is often a legitimate and prudent option for a college facing the prospect of extended and expensive litigation. However, there is a danger that in response to government agency pressures colleges may become more inclined to compromise rather than litigate even those issures which go to the heart of the education enterprise and integrity of the institution.

The Challenge

A significant danger posed by the increasing pressures and complexities of the developing legal environment of higher education is that individuals and institutions may become cynical and overly defensive in responding and adjusting to that environment. This danger has a direct bearing on the continuing vitality of the institutional mission and identity of church-related colleges.

In light of this developing legal environment, the papers on legal issues address three general areas: (1) specific legal issues confronting church-related colleges, including those problems shared with independent higher education generally and those problems which are unique to church-related institutions; (2) options for church-related colleges individually and collectively in facing and adjusting to the changing legal environment, including an analysis of sources of legal information and models for improving the delivery and availability of legal services to church-related colleges; and, (3) doctrines of American constitutional law which might be relied on by independent and church-related colleges to reassert their autonomy and integrity, and practical consequences of a general theory of institutional rights of independent colleges for their own self-evaluation and for litigation strategy.

These papers are intended to stimulate thought and discussion. They do not attempt to offer comprehensive strategy recommendations for responding to the legal environment. The papers are, in short, a starting point rather than a conclusion.

The church constituencies no less than the college must carefully examine and come to terms with the new legal environment of church-related higher education. There is extraordinary diversity in the nature of religiously affiliated colleges and in their relationships to religious bodies. Accordingly, the treatment in the legal issues papers is necessarily general, and the concepts expressed in the papers must be considered in light of particular institutional situations, missions, and programs. For purposes of consistency, the papers use the term "church-related colleges" generically to include colleges and universities of all of the various patterns of religious affiliation, relationship, and faith commitment.

The qualities, traditions, and purposes of the church-related higher education sector provide a capacity and opportunity to make a real contribution to the ways in which higher education generally will have to adjust to its changing legal environment in the 1980s.

In order to meet these challenges, a certain level of literacy about the legal environment will be required of the various college and church constituencies so that informed institutional postures and cooperative strategies can be fashioned in a manner consistent with the mission and goals of church-related higher education. It is hoped that the legal issues papers make some contribution to that end.

Chapter 2

LEGAL ISSUES FOR CHURCH-RELATED COLLEGES AND UNIVERSITIES

Philip R. Moots

Introduction

To a very substantial degree the greatest number and the most erious legal problems for church-related colleges and universities are hared with other independent and public colleges and universities and with most charitable institutions. Those problems emerge from dramatically increased calls to accountability from government regulator as vell as private litigant.

An examination of virtually any higher education publication is ikely to disclose one or more stories about the ever increasing threats o university autonomy from federal and state governments. Even a artial listing of the federal laws and regulations which brought new egulation to higher education institutions in the past ten to fifteen ears is remarkable. Some of the more prominent include –

a. Titles VI and VII of the Civil Rights Act of 1964, as amended
b. Executive Order 11246, of 1965 as amended
c. The Equal Pay Act of 1963
d. Title IX of Higher Education Amendments of 1972
e. The Age Discrimination in Employment Act of 1967 and the Age Discrimination Act of 1975
f. The Fair Labor Standards Act, of 1938, as amended
g. The Unemployment Insurance Requirements in Employment Security Amendments of 1970
h. The Social Security Act of 1935
i. The Health Maintenance Organization Act of 1973
j. The Employee Retirement Income Security Act of 1974
k. National Labor Relations Act of 1935, as amended
l. The Occupational Safety and Health Act of 1970
m. Rehabilitation Act of 1973
n. Vietnam Era Veterans Readjustment and Assistance Act of 1974
o. The Family Educational Rights and Privacy Act of 1974 (Buckley Amendment)

The problems with government regulation of higher education do not op with the recitation of the multitude of laws and regulations which ow apply to colleges and universities. Equally frustrating to administrators of colleges and universities are the duplication, overlap, the conflict of regulations which are brought to bear on the campus. For example, in the equal employment and affirmative action arenas, the Equal Employment Opportunity Commission, the Office of Civil Rights in the Health, Education, and Welfare Department, the Office of Federal Contract Compliance Programs of the Department of Labor, and the Internal Revenue Service as well as various state regulatory agencies all have had jurisdiction in recent years.

Higher education administrators complain not only that inefficiencies result from such multiple jurisdictions but that most of these agencies do not really understand the nature of higher education institutions and how employment practices differ from those of an industrial or commercial employer. Obviously, the decisions made on campus with respect to the hiring, promotion, tenure and termination of faculty and staff persons go to the heart of determining what kind of institution the college will be, and these questions appear to provide the greatest number of frustrations and complaints from university representatives.

In addition, there are increasing complaints about the requirements of accreditation agencies and the negative impact of those agencies upon the autonomy of academic institutions in carrying out their appropriate missions. State higher education coordination agencies have also become a force to be reckoned with in many states, and they add another element to the narrowing of university independence.

The impact of national trends, such as consumerism, have had a great effect upon the campus. Lawsuits filed by students challenging decisions about admissions, grading, discipline, dismissal, and treatment of student organizations have required a good deal of rethinking by college administrators about how and with what degree of formality these judgments are made, especially when there is always present a threat of second-guessing by courts and governmental administrative agencies.

It has long been the hope and expectation of independent higher education that private institutions hold a greater degree of autonomy in their own decision-making than public colleges and universities, but independent institutions are becoming more vulnerable to government regulation and private litigation. Federal and state funding has substantially increased the role of federal and state regulatory agencies over private campuses. Private litigants have attempted to fashion new theories of liability for private colleges based upon their public character. New theories have also been brought to bear to provide legal foundations for the assertion of students' rights in ways which would have been only rarely, if ever, considered a decade or so ago. For example, provisions of the student catalogue and student recruiting brochures have been used by courts in recent cases to find that independent and public institutions alike had formed a legally-binding contract with these students and would thus be required to reimburse students for programs which the courts deemed inadequate.

Special Legal Problems of Church-Related Colleges

In addition to the multitude of legal problems which church-related colleges share with other educational and charitable institutions, there are unique legal issues which emerge from the relationship of college to church. Among the most important of those are (a) the assertion of legal liability of the church for actions of the college to which it is related, (b) the eligibility of church-related colleges and their students for public financial assistance, (c) legal questions raised by government regulations which are uniquely applicable to church-related colleges, and (d) property ownership and control questions.

In order to keep a proper perspective on these problems, one must be aware of the obvious: Legal issues are only one aspect of the total network of relationships between a particular college and church. Legal issues, however, are often given undue priority in policy discussions or even used as excuses to avoid facing the real policy issues. It cannot be emphasized too strongly that campus policy decisions cannot be made on the basis of legal considerations in isolation.

A. Liability Issues

Under certain conditions legal liability, which we might call "ascending liability," may be imposed upon a religious body related to a college as a result of actions or omissions of the college and its representatives, including the trustees representing the religious body. Emerging trends of litigation indicate that liability issues are likely to become increasingly urgent problems. Although there are a multitude of cases which present new and troublesome questions about the liability of colleges themselves, only a few existing cases directly raise issues of ascending liability. Such cases, however, suggest serious consequences which sponsoring religious bodies must take into account. In one recent case, for example, a woman student sued the college, all individual trustees, and the sponsoring religious body for damages she suffered as a result of injuries she allegedly sustained from an assault in her dormitory.[1] In another instance, individual trustees and administrators of a Jesuit high school were joined as defendants with several related religious bodies which were alleged by the plaintiff to have joined together in an unlawful conspiracy in committing negligent and fraudulent acts which led to the financial collapse of the school.[2]

The widely publicized "Pacific Homes" litigation involves a class action suit by residents of retirement homes in California who named as defendants the United Methodist Church, two annual conferences, and various boards and agencies of that church.[3] The damage sought by plantiffs exceeded $260 million, and the legal expenses incurred by various boards and agencies of the United Methodist Church in defending against that suit have reached $900,000 in less than two years of litigation.

It is not possible to state with certainty how this area of the law will evolve in the future, but a general statement about ascending liability can be framed in these terms: The key element in determining what, if any, legal liability a religious body may incur as a result of the action of a related college is the degree to which the religious body exerts control over the affairs of the college.

It is not possible to state with precision at what point a court will determine that a religious body has incurred liability for the acts of a college to which it is related. The matter is particularly complicated because standards governing imposition of liability vary from state to state so that any generalizations must be tested against the particular law of the jurisdiction in question.

In general, however, for reasons stated earlier, it may be assumed that these risks are increasing for non-profit institutions like colleges, which in the past have been treated with a good deal of deference. In a changing judicial climate which tends to hold charitable institutions more accountable for their actions, there is real likelihood that ascending liability principles will be widely accepted.

It is true, of course, that most churches and colleges will assume these risks consciously and attempt to minimize them by careful management and securing of liability insurance when that is available. It is certainly not the purpose of this paper to discourage relationships between colleges and religious bodies, but rather to encourage recognition of the problems and proper initiative to meet them.

One further issue must be mentioned in this context. All individual trustees, including those representing a church, may incur personal liability for their actions on behalf of the college. That issue is separate from that of liability attributed to a religious body for action of college trustees, but it is a serious matter to be considered by any religious body which selects trustees to serve on college governing boards and thus benefits from their service.

If a church chooses to be involved in the life of a college or university, it must do so responsibly. Leaders of colleges and churches alike should have a clear understanding of the legal consequences of their relationships and how they are structured. Problems posed by ascending liability and individual trustee liability concepts are disquieting but hardly insurmountable. In a real sense, these liability considerations serve to push representatives of the college and religious body to take precautionary steps which can only be considered beneficial for the overall health of both institutions. For example, the whole process of trustee selection and training must be taken seriously. Trustees must be chosen carefully and informed fully about how to fulfill their legal responsibilities. Steps such as the enactment of indemnification provisions and securing liability insurance should be taken to protect trustees against personal financial loss.

In addition, trustees should be required to take part in trustee orientation programs when they are initially selected as well as periodic continuing education programs which inform and keep them up to date with respect to legal as well as other important matters. This is vital not simply so that trustees (and administrators alike) are aware of their potential legal liabilities, but so they understand as well the limits of their legal duties and do not over-react to cries of alarm about such matters.

B. Public Financial Assistance

We assume that the great majority of church-related colleges in this nation accept some form of institutional aid from federal or state governments. This paper will limit discussion to analysis of standards for federal support because state support standards vary so substantially. There is simply no substitute for a detailed review of the constitution, legislation, case laws, and opinions of the attorney general of the state in question. Suffice it to say here only that the state constitutions and their interpretations are much more likely to present problems for aid to church-related institutions of higher education than does the federal constitution.

The federal constitutional standards applied when government financial assistance is given to the institution are set forth in a trilogy of recent United States Supreme Court cases: *Tilton v. Richardson*,[4] *Hunt v. McNair*,[5] and *Roemer v. Board of Public Works of Maryland*.[6] In those cases the Court was primarily interested in determining whether the colleges before them were carrying out their educational mission with academic integrity and thus were not so "pervasively sectarian" or permeated with religious influence that public financial assistance to them would be impermissible under the Establishment Clause of the First Amendment. In reaching this conclusion, the Supreme Court accepted the findings of the lower courts that what was taking place in those church-related colleges was free academic inquiry rather than religious proselytism.

The legal or formal relationships between a college and church, such as the selection by the church of all or some members of the governing board of the college or a requirement that the president or other key officers of the college be selected by or subject to the veto of the church or be a member thereof, are important elements to consider in defining a relationship between college and church. It seems clear however, under the standards set forth by the United States Supreme Court, that no single element of such formal legal control or any combination of such elements will invalidate public funding.

Questions are frequently raised about whether certain religious activities or observances on campus will endanger eligibility for public financial assistance. Administrators at religiously affiliated colleges who wish to continue to receive public financial assistance must consider whether certain forms of religious observance jeopardize such assistance. The key to that analysis seems to be to avoid significant coercive activities which indicate an attempt to indoctrinate students to adherence to a particular belief or denominational allegiance.

When government funding is provided only to the students, the Supreme Court appears to have said that these structural relationships are without any significance. In *Americans United for Separation of Church and State v. Blanton* the Supreme Court summarily affirmed the decision of a federal district court which upheld a Tennessee student assistance program giving students in that state the freedom to choose an accredited college or university, whether or not it be sectarian.

While the Supreme Court provided no opinion, the district court opinion and the documents filed by counsel with the Supreme Court indicate that the Court surely understood this decision supported the right of a state to provide assistance directly to all college students, including those who attended even pervasively sectarian institutions.

Where there is a strong bond between church and campus, there may be an equally strong tendency to prefer students who are members of the religious body in question or at least to recruit actively for those students from local congregations of the religious body or from "feeder" high schools associated with that church or religious community.

In the Supreme Court trilogy mentioned above, the Court also referred to the religious composition of the student body as an element to be factored into the eligibility of a college for public funding. Again, however, these formulations are often indefinite and contradictory, but the dicta merit consideration because they amount to the only guidelines we have in this area. Some judges seem totally opposed to the exercise of any such preference in student admissions, while others appear to believe that some preference is permissible, but without stating how much would be deemed constitutionally acceptable.

Perhaps again it would be adequate to rely on the words of Chief Justice Burger who noted that while the student bodies of the colleges in question were predominantly Catholic in *Tilton*, the evidence showed that non-Catholics were admitted as students. It is fair to say that none of the judicial dicta indicate that college administrators are constitutionally compelled to eliminate religious preference from their colleges to remain eligible for public institutional assistance.

In *Blanton*, the Supreme Court affirmed the district court decision upholding state aid for students attending colleges which were "pervasively sectarian" even though the colleges established religious requirements for student admissions.

C. Government Regulation of Church-related Colleges

The federal government may seek to establish regulatory jurisdiction over colleges and universities in a variety of ways: (a) directly, under the specific terms of a statute such as the Civil Rights Act of 1964 as amended in 1972, or the Age Discrimination in Employment Act of 1967 as amended; (b) as a recipient of federal funds, as in Title IX of the Education Amendments of 1972 or the Family Educational Rights to Privacy Act (the Buckley Amendment); or, (c) as a "contractor" with the federal government, as in Executive Order 11246 or Section 503 of the Rehabilitation Act of 1973.

1. *Exercise of Religious Preference in Employment Policies*

For any college or university the selection of key employees in faculty and staff positions is a fundamentally important element in casting the character of the campus. For administrators of many church-related colleges where the relationship between church and campus is strong and vibrant, there is deep concern about the religious character or orientation of these employees. This does not mean that the institution necessarily prefers only members of the church or religious body to which the college is affiliated, though it may mean that in some instances. For many colleges it means that there is an intent to secure a faculty and administrative staff with a strong representation of those who share the fundamental and unique goals and orientation of a church-related college.

If the college administration seeks to exercise religious preference in these employment matters, it will be confronted by a tangle of complicated requirements of federal and state statutes enacted by Congress and state legislatures, interpreted by federal and state administrative and regulatory agencies, and construed by federal and state courts. There is time in this paper for only the briefest mention of federal constitutional, statutory, and administrative requirements related to this religious preference issue. Again, it is necessary to say that the administrators of colleges in every state must examine the relevant law of that particular state to determine what, if any, provisions bear upon the choices. On the federal level, the law which must be considered is so complex that we can only mention the various elements which must be considered and leave to references cited in the bibliography a detailed analysis of the legal authorities.

The initial question facing a college administration wishing to assert the right to exercise religious preference in their employment policies is whether they might in doing so render their institution ineligible for federal funding. No case has squarely presented this question to the United States Supreme Court to date, and the only intimation of the Court's response must be gleaned from the Supreme Court trilogy mentioned above from the dicta provided by various justices in those cases. Those opinions are not consistent in their treatment of this issue and in some instances appear to be only casual remarks rather than careful analysis. However, based on the language used by Chief Justice Burger in *Tilton*, it can be concluded that a college administrator may safely exercise religious preference to create a predominance of faculty members belonging to a particular religious group without jeopardizing eligiblity of the institution for public assistance.

The eligibility of a church-related college for public assistance is closely related to the eligibility of its students to receive federal or state assistance, but student aid remains a distinct category. In two recent decisions[8] the Supreme Court affirmed without opinion lower court decisions which upheld student aid programs, in one instance even though religious requirements were set forth for faculty and students, and the institutions themselves were admittedly permeated with the dogma of the sponsoring religious organization.

It would be unwise to read too much into court decisions that were concerned only indirectly with religious preference in employment issues, but a sound judgment can be made that a policy of religious preference in the selection of faculty and administrators which results in a preponderance of these employees with a particular religious commitment would endanger neither institutional assistance nor aid to students attending the institution.

In 1964 the United States Congress enacted a Civil Rights Act of monumental importance in the history of this country. Title VII of that act, as amended in 1972, applies to colleges and universities and prohibits employment discrimination based on a person's race, color, religion, sex, or national origin. Three different provisions were provided in the act, however, which set forth the legal authority to support an employment policy by church-related colleges and other religious organizations to exercise religious preference in various job categories.

Section 702, as currently amended, states a broad exemption from the discrimination prohibitions of the title for religious corporations and associations with respect to the employment of individuals performing work connected with the activities of the institution. Section 703 (e) (1) provides that all employers may take into account an individual's religion, sex, or national origin when one or more of those categories might be a "bona fide occupational qualification" which is reasonably necessary to the operations of the business or enterprise. And finally, Section 703 (e) (2) provides an exception to permit colleges or universities to exercise religious preference if they are "in whole or in substantial part, owned, supported, controlled, or managed" by a particular religion or religious corporation or society, or if the curriculum of the college is directed to the propagation of a particular religion.

At first blush these provisions appear to provide a good deal of protection for church-related colleges which wish to exercise religious preference in employment matters, but there are two difficulties involved with these provisions: the problems of interpreting their precise meaning, and the question of whether they would withstand constitutional challenge. Although there are no cases which interpret these provisions as they apply to a church-related college, in one instance an eminent panel of federal court of appeals judges raised serious constitutional questions about section 702 insofar as it purported to permit religious preference to be exercised with respect to employment positions which had no demonstrable link to the religious mission of the college.[9]

Finally, Executive Order 11246 requires contracts or subcontracts with the federal government to include a nondiscrimination clause which prohibits the contractor from discriminating on the basis of religion, among other things. The penalty for noncompliance is the cancellation or termination of the contract and ineligibility of the contractor for further contracts of the federal government. In 1975 the Office of Federal Contract Compliance amended its regulations which construe the Executive Order to follow almost verbatim the language of the exemption in Section 703 (e) (2) of the Civil Rights Act. The Executive Order, then, is subject to all of the interpretative and constitutional questions applicable to that section as well as other problems of its own.

Although it is necessary to leave to other sources (some of which are listed in the bibliography) a detailed analysis of this complex body of law, it is fair to conclude that if administrators of church-related colleges wish to assert a right of religious preference where there is no demonstrable nexus between the employment position in question and the religious goals and activities of the college, they must be prepared to risk litigation which would test the constitutional validity of the broad statutory exemptions noted above. It appears that such litigation could well result in the narrowing of the statutory exemptions. It is likely that religiously affiliated colleges cannot be granted an absolute immunity from the general prohibition against employment discrimination on the basis of religion because the courts must protect both the religious freedom of employees or prospective employees of these colleges as well as the religious interest of the colleges themselves.

2. *Use of Publicly Funded Facilities*

When church-related colleges and universities receive public funds in the form of grants or loans to construct campus facilities, restrictions inevitably are imposed with respect to the use of these facilities. Again, it is important to note that legal problems exist with restrictions on the use of state as well as federally funded facilities, but for the sake of simplicity and clarity, discussion will be limited to federal standards.

Some measure of the importance of these issues to church-related colleges in the fall of 1978 which indicated that the average responding college had received more than two million dollars since the federal Higher Education Facilities Act was enacted in 1963. Those figures are even more striking because the survey responses included only a handful of the major church-related universities which, on the average, tend to receive much larger amounts of these funds than do small colleges.

The Higher Education Facilities Act of 1963 as amended prohibits funding under the Act for "any facility used or to be used for sectarian instruction or as a place for religious worship." In addition, there is a further restriction imposed that "no facility constructed, reconstructed or renovated with assistance under this sub-chapter shall ever be used for religious worship or a sectarian activity or for a school or department of divinity."

The language of these sections seems clear enough, but many questions have been raised about its application. Is a university permitted to hold annual baccalaureate services in a campus center constructed with federal funds received under this Act? Can meetings of student religious organizations be held in rooms of this campus center, or can offices in the center be used by these student religious organizations? Can the campus chaplain or staff persons from off-campus religious foundations use publicly-funded dormitory facilities for individual or group counseling?

Can classroom or other facilities constructed with these funds be used for the teaching of religion in any form? Sacred music? Can these buildings be used as offices of faculty who teach religion, theology, or sacred music?

If fees are not charged to a group engaged in any "religious" activity for the use of publicly funded facilities, does that imply constitutionally questionable financial support to the group? If fees are charged for use of the facilities, must they be charged uniformly to all groups for all uses? Must the fees be set high enough to cover all expenses incurred?

There is a remarkable lack of clarity in the regulations and case law, which do not offer guidance to college administrators about these issues. Neither a review of the extensive legislative history nor an examination of the regulations cited under this Act offers any enlightenment. The loan agreement which merely replicates the statutory restriction provides no further guidance.

Few cases interpret these statutory provisions as they apply to church-related higher education. However, a dearth of reported court decisions does not mean that a particular regulation or law is not causing problems for the institutions being regulated. Difficult conflicts may not reach formal adjudication; the institutions may simply comply as a result of administrative pressure from H.E.W. representatives. These are important problems which deserve serious attention even if they were not widespread, and it appears that both college administrators and government officials are reaching erroneous conclusions about the mandates of the legislation.

Some H.E.W. officials are prepared to interpret the restrictions in very broad terms indeed, some of which range well beyond the wording of the Act. For example, one investigator told officials of a southern church-related college that the use of a humanities building constructed in part with federal funds for the teaching of sacred music courses and for offices of an instructor who taught courses in religion violated the statute. The official insisted that the Office of Education would call the loan and require the return of grant funds immediately unless the college stopped both of these uses of this building. The college protested that neither the sacred music course nor the courses in religion were taught in any way from a "sectarian" point of view, but in order to avoid the expenses of litigation (which it should have won handily), the college complied with the orders.

The problems posed by this kind of process are two-fold: Religiously affiliated colleges are being required to comply with interpretations of the law which are at best questionable, and those standards are being established at the lowest levels of administrative decision-making and consequently they may vary considerably among regional offices of H.E.W. or even within those regions according to the personal whims of the investigator.

There are few judicial decisions which provide guidance in this area, but if the few cases dealing with colleges are carefully examined and read in conjunction with cases dealing with the use of public facilities for religious purposes at public primary and secondary schools, one can extract some principles for guidance. It must be clearly understood, however, that government administrators may not agree with these interpretations; as in other areas, the college may be required to undertake litigation to establish its position.

Academic activities which meet the standard of the Supreme Court trilogy for determining the propriety of public funding should be permitted in facilities funded under the federal statute. For example, the teaching of philosophy of religion or sacred music with academic integrity should not be viewed as "sectarian instruction," nor should there be a prohibition on the use of the facilities in question for offices by faculty who teach these kinds of courses.

The use of these facilities for other gatherings or assemblies should not be restricted unless they are indeed "religious worship," "sectarian activity," or "sectarian instruction." For example, meetings of campus religious organizations and counseling sessions with clergy may be neither worship nor sectarian activity.

Finally, and perhaps of greatest importance, administrators of church-related colleges should take advantage of statutory provisions[10] which are now apparently only informally used and understood to permit the construction of areas within a federally funded facility which could be paid for with private funding and could then be used for otherwise prohibited activities, such as worship or sectarian instruction. There appears to be clear authority for this process in the statute, and the provisions imply a far greater degree of flexibility in negotiating about these matters than is often exhibited by H.E.W. officials empowered to construe the act in the first instance.

D. Property Relationships

In a time of increasing financial pressures, some religiously affiliated colleges may be forced to close or merge with another institution or may seek to separate from a relationship with a religious body in order to remove any possible question that the college is qualified to receive public funding or to seek another more financially advantageous relationship.

Almost without exception such departures by the college raise questions and sometimes contests about which institution owns what property. These experiences underline the importance of consideration of property ownership questions by campus and religious body alike in order to clarify a common understanding about property holdings and insure that legal documents reflect that understanding.

As noted earlier, a myriad of legal arrangements exists between churches and colleges. It is ordinarily necessary for the resolution of property ownership questions to look to (a) applicable state law, (b) legal documents which relate to the property in question, (c) the governing documents of the college, and (d) even those of the related church.

The property law of the various states differs widely, so this paper will simply mention briefly some common legal patterns which exist among the states for illustrative purposes. We assume for purposes of this section that the church does not have voting control of the governing board of the college nor personal relationships sufficient to influence decisively actions of that board. If that control or influence does exist, the church usually can dictate property disposition through the college governing board, and this discussion is largely unnecessary. We also assume that under some circumstances a related religious body may seek to recover property which has been contributed to the college not only by it directly but also by others as a result of the relationship of the religious body to the college.

The difficulty of these issues can be illustrated by examples which are not at all unusual but are typical kinds of situations which church and college administrators as well as judges have had to face in this nation.

Suppose a gift of $100,000 has been made by an individual donor, who is a long-time and devoted member of a particular religious body, to a college sponsored by that religious body for use in its discretion but "only so long as it is used for Christian higher education purposes." The college administration determines to use this gift as a scholarship endowment, the interest of which is used to provide scholarships to needy students. Ten years after the time the gift is made, the college runs into severe fiscal problems and is forced to close down and dissolve. If this $100,000 fund survives the claims of creditors and the religious body asserts a claim to it, what should a reviewing judge do with that claim?

Should the funds be given over to the religious body to use in its discretion for higher education? Should the funds revert to the donor or the donor's heirs? If there are no other colleges within the court's jurisdiction related to that particular religious body, should the funds be sent to a college in another state which is also related to that same religious body? Or should the court direct the gift to another college related to a different Christian religious body but located within the same county as the original recipient where the judge has jurisdiction (and must run for re-election)?

Suppose these questions of ownership of the endowment fund arose not because the college was in financial trouble but because it resented continued policy intrusions by the religious body and sought to sever the relationship and proclaim itself an institution without connection to any religious body but with a deep concern about teaching values, and it further committed itself to maintain its distinguished department of religion. Suppose instead that the endowment fund ownership question was raised by the sponsoring religious body which was increasingly dismayed by the recruiting practices of the college which, while carefully continuing to proclaim its formal relationship to the religious body, exhibited little concern in recruiting students, faculty, or staff who cared about religious or value questions and further was permitting the religion department to disintegrate.

Ordinarily the first place to look in determining disposition of assets for a college facing financial collapse or seeking merger is to the non-profit corporation code of the state in question. Those statutes, as one would expect, vary significantly among the states, but probably the most useful general pattern to examine for illustrative purposes is the Model Non-Profit Corporation Act which has been adopted or at least taken into consideration by many state legislatures in the process of enacting a non-profit corporate code.

The Model Act provides that after satisfying or providing for the liabilities and obligations of the corporation, the responsible parties follow a series of steps in distributing the assets. Two points deserve emphasis about these provisions.

First, property held upon express condition requiring that specific action be taken to distribute that property upon dissolution is given a first priority. An illustration of such a condition would be the following provision: "If the college for any reason ceases to be related to the United Methodist Church as determined by the University Senate thereof, this property will be divided in as equal shares as practical among all the United Methodist colleges then operating in the state of Ohio." The lesson here, of course, is that foresight by a donor in establishing such conditions is rewarded under the Model Act.

Second, if such conditions are not imposed, the governing board of the failing college will have virtually unfettered discretion with regard to distribution of those assets because that board can adopt a "plan of distribution" called for in the Model Act or design the governing documents of the corporation to accomplish the desired purpose. Again, statutes of individual states vary a great deal, but the Model Act pattern makes clear that neither the religious body nor any other donor will have anything legally to say about assets given by them to the college unless conditions are specified with respect to the gifts. Even if there are adequate legal restrictions in the governing documents of the college to control transfer of the gift property, those are easily changed by the college governing board unless the religious body can control or influence the actions of the board.

If a state has not enacted a non-profit corporate statute or the statute does not cover a given factual situation, the common law doctrine of *cy pres* is likely to be applied by courts in most states to direct the disposition of the assets of a dissolved college. In summary, this *cy pres* doctrine is applied to charitable gifts which cannot be executed because it has become impossible, impractical, or illegal to do so, and the doctrine provides that courts will seek to redirect the gift assets to similar purposes or agencies.

Two observations should be made about the *cy pres* doctrine. First, it is an attempt by the courts to adhere to the general intent of the donor. Judges ordinarily will seek to determine that intent from documents or surrounding circumstances which indicate what the donor's wishes were. Second, most of the corporate non-profit statutes enacted to specify disposition of assets of a failed non-profit corporation can be seen as embodying *cy pres* principles, but there is one substantial difference: Under the *cy pres* doctrine the determination about the disposition of those assets is always made by a court, not the governing board of the dissolving college.

In the event the college and church sever their relationship in circumstances which do not involve dissolution, as a result of a policy dispute, for example, neither the Model Code nor *cy pres* will apply. The legal doctrines of the various states will then determine ownership of the property, and the law of contract, trust, charitable gift subscription, and estoppel are among the doctrines which may control the outcome.

Again, however, the judicial inquiry is the same: What did the parties really intend? When the specific fact situation is one for which the parties did not provide, the courts will seek to determine from available documents or surrounding circumstances what the parties expected from their relationship and whether those general expectations furnish guidance about the incident in question.

For example, if a gift were donated to College X with an accompanying letter stating it was "to be used for College X," it makes no difference on the face of the document whether College X continues to be related, for example, to the Jesuits. All it has to do is continue to be College X. However, if that donor or those claiming on behalf of the donor were able to introduce further correspondence between college officials and the donor which clearly indicate the reason for the gift was the donor's concern for Jesuit higher education, and everyone understood that this gift was given solely because of the relationship of College X to the Jesuits, a court is quite likely to view a departure by College X from a relationship with the Jesuits as forfeiting that gift.

As a general rule, unless the donor takes the initiative to establish conditions or restrictions on gifts to related colleges, the donor runs a substantial risk of losing any such property in the event the college collapses or moves to dissolve the relationship with the religious body.

There are at least two basic reasons why this is so: (1) Courts are reluctant to cause forfeitures of contributions to charitable institutions, including colleges, which depend heavily upon the stability of such gifts, and (2) the equities would be usually perceived to lie with the donee college when a donor or group of donors which could have specifically stated restrictions failed to do so.

These property relationship questions can realistically be analyzed only in conjunction with all other legal as well as informal links between the religious body and college. For analytical purposes, this paper has discussed property relationships more or less on their own, but it is likely that in the usual case other links must be considered as well. For example, some representatives of the religious body may sit on the governing board and thus influence decisions of the college even if they may not hold controlling votes.

So, when property questions arise in the midst of some disagreement or crisis in the relationship between college and religious body, there will likely exist means of communication and pressure in addition to any legal documents related to the property being contested. Ordinarily, for example, the property issue is important to a religious body not simply with respect to a single college but also for its implications for a whole structure of relationships between many colleges and the religious body. The choice of action to be taken is likely to reflect policy issues reaching well beyond a property skirmish at a particular college.

If either a religious body or a college wishes to establish restrictions, conditions, or qualifications with respect to the use of donated property, it is far preferable to state these matters in writing than to assume agreement which may or may not exist. No matter what the intentions of the parties or where the equities lie in a particular situation, unless the restrictions are clearly stated, litigation is likely if these relationships deteriorate and the property in question is substantial. Litigation in such situations ordinarily means not only unwelcome legal expenses but also attendant adverse publicity and lingering ill will for all involved.

Conclusion

There is little to indicate that the trends which have created the battery of legal problems for higher education will slacken in the foreseeable future. One must assume a need for continuing concern and attention to these problems created for colleges, related religious bodies, and trustees and administrators of both.

It is possible that the current public and political outcry against government regulation will produce less regulation or at least more careful administrative patterns. This, however, will require increasing and continuing pressure to counter the natural expansive tendencies of government regulators.

In general, it might be said that representatives of churches and church-related colleges must become smarter and tougher if they are to meet successfully the challenges presented by these legal issues. A detailed discussion of techniques and tools to enhance both the understanding of these issues and the capacity to meet them is presented in another paper on legal issues. For purposes of this paper, suffice it to say that dealing with legal issues requires much the same response as meeting other challenges presented to church-related colleges of our day, and it ties directly to the other issues facing church-related higher education.

It certainly is necessary to take a greater initiative in the legislative, regulation, and litigation arenas than has been the practice in the past, rather than waiting for actions to be taken by others who may not be very understanding or sympathetic to church-related higher education. Tied directly to that initiative is the broader requirement that representatives of church-related higher education must do a better job of articulating a rationale for this kind of education and why it provides special contributions to our society. Institutions do not receive special or favored treatment in this day (such as special tax treatment or exemptions) without demonstrating a compelling rationale for such favored treatment. This effort must receive greater attention from all of us, working with the alliances which are becoming available, such as John Gardner's organizing committee for the Coalition of National Voluntary Organizations and the National Council on Philanthropy.

Once the rationale is established, it must be effectively communicated to church constituencies, public policy-makers, and the public at large. Perceptions of the role or worth of religion, higher education generally, and church-related higher education have a direct impact on legislation, regulation, and judicial opinions.

And finally, it will be necessary to join together in this effort. The task is far too great for one higher education association, denomination, or other religious body to tackle; we must share our resources and vision in this great task.

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[5] *Hunt v. McNair*, 413 U.S. 734 (1973).

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[7] *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 98 S. Ct. 39 (1977).

[8] *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 98 S. Ct. 39 (1977); *Smith v. Bd. of Governors*, 429 F. Supp. 872 (U.D.N.C.), summarily aff'd, 434 U.S. 803 (1977).

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Chapter 3

DELIVERY OF LEGAL SERVICES

Kent M. Weeks

I. Overview

In higher education the quiet steady growth of the 1950s gave way in the 1960s to a period of student unrest and reassessment of institutional values. In turn, the decade of the 1970s might be characterized as a period in which higher education has come of age. Like other enterprises, higher education faces substantial governmental regulation, pervasive legal entanglement, and potential lawsuits.

The preliminary findings from a study on the delivery of legal services sponsored by nine higher education associations provides some interesting data and commentary on these developments.* That study states: "The culmination of these trends has exposed higher education and their lawyers to a welter of statutes, regulations, cases, and more formal internal procedures. They justifiably have felt rather beleagured."

We can make a few general observations about the variety of ways that institutions are adapting to these new developments. First, while objecting to governmental regulation that accompanies acceptance of federal funding, few institutions are willing or able to forego the funds that trigger the regulations. A few institutions have turned down the money, but most are struggling to implement the regulations, sometimes conceding more than they need to concede.

Second, there is a tendency at many church-related institutions to avoid controversy and to compromise rather than pursue valid legal claims through the courts. Legal challenges have been viewed as violating the collegiality that traditionally has been the hallmark of the campus.

Finally, institutions have been reticent to consult with attorneys, who are viewed with skepticism as expensive, delaying, and litigation prone. At many church-related colleges, lawyers have served on the board and have reviewed contracts and legal documents, but rarely have they been asked to serve in a preventive legal consulting capacity.

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*Preliminary findings of the principal investigator performed for the Interassociational Study of the Provision of Legal Services to Colleges and Universities, January, 1979, (hereinafter referred to as the Legal Services Study).

Both institutions and faculty members have in the past been confused by the judicial maze and the tedious litigation process. Times have changed, however, and all segments of the academic community are seeking to have problems resolved in the courts. Here is a sample of actual cases emanating from church-related colleges and universities:

> A college declares bankruptcy in order to preserve its remaining assets; a receiver is appointed to "run" the institution.
>
> A student sues the college for failure to comply with its catalogue requirements on academic dismissals.
>
> A tenured faculty member sues a college for violation of due process and failure to follow national guidelines on dismissal.
>
> A college board unilaterally alters its charter and its provisions relating to church control and trustee approval.
>
> Faculties seek recognition under the National Labor Relations Act while other colleges are entering their second or third round of contract negotiations.
>
> A college professor sues a college under Title VII alleging discrimination in promotion and tenure decisions.
>
> A terminated dean sues a college for reinstatement, tenure, and defamation.
>
> A college professor sues a college for reinstatement and damages because the college failed to apply its due process requirements and prove financial exigency.

This sample of cases lends credence to this assertion of the Legal Services Study: "All clients in our society have been subjected to the twin stresses of increased assimilation into broad legislative programs and increased regulation tied to their specialized function. In short, our society is placing too much reliance on the legal process, and very few clients of any type receive the legal services which they should." Implicit in this statement is the notion that preventative steps ought to be taken so that conflicts can be resolved by mechanisms other than formal court proceedings.

There are several ways that church-related colleges can respond to our increasingly litigious environment. First, colleges can join together, as many have done, in groups or national associations to influence national or state legislative policy and regulation. The National Association of Independent Colleges and Universities (NAICU) acts as an advocate at the federal level, and some state associations monitor state legislative activity. In lobbying, these organizations have argued for self-regulation as a more effective and less entangling means than government regulation. Concomitantly, the organizations have encouraged self-regulation among their constituent members. Lobbying, then, can be one response. This response is discussed in the papers on public policy issues.

Second, colleges can resist application of government requirements that are viewed as unwarranted intrusions into the internal affairs of the college. Mississippi College has challenged efforts by the Equal Employment Opportunity Commission to acquire employment data. The college asserts that such request violates its constitutional rights as a church owned and operated institution.

Colleges can file lawsuits to prevent the applicability to them of a particular regulation or statute. Grove City College and Hillsdale College have challenged the applicability of Title IX to their institutions.

Third, as detailed in the legal issues paper on legal theories and strategies, new legal theories can be advocated to contain government intervention and to preclude overreaching by the regulators. For example, the American Council on Education (ACE) has argued vigorously that academic freedom requires a certain institutional autonomy in personnel decisions.

Fourth, church-related and other independent colleges can join in amicus briefs, an effective form of judicial advocacy. Cooperative efforts were successful against challenges to public funding of student and institutional aid programs. In some cases, a few beleagured state associations initially bore the tariff for lawsuits that affected the entire community of church-related higher education. Recently, both NAICU and the ACE have emphasized legal advocacy on behalf of higher education through amicus briefs.

Finally, church-related and other independent institutions can use legal services to implement preventive measures on their own campuses and to defend themselves when necessary. This paper is devoted to discussion of this strategy – the delivery of legal services to church-related institutions – and to the changing legal environment in which colleges operate.

This paper addresses the question, "Is there a need for an improved system of legal services?" It also presents various sources of legal information and suggests options for the improvement of delivery of legal services.

II. Is There A Need For Improved Delivery of Legal Services In The New Environment?

There are three reasons why the existing system of legal services may not be adequate for any given college or group of colleges. First, legal services are expensive; few colleges perceive such services as essential to their survival and budget the necessary funds for legal services. Second, higher education law has become a specialized and complicated area of the law; not many local attorneys have the incentive or time required to develop competency and monitor changes in this rapidly developing area. Third, few colleges seek preventive counsel.

The greatest barrier to adequate legal aid is perceived as its high cost. Among colleges responding to the Legal Services Study survey, high costs were cited as the most important concern; independent institutions cited this as a concern more frequently than did state institutions. Legal counsel is expensive, but so are lawsuits borne from inadequate preventive practices and from inadequate compliance with statutory and regulatory requirements.

Some colleges may not perceive a need for legal services. Every day, however, legal decisions are made either as the result of thoughtful preparation or by inaction. Instututions are required to file, for example, annual certificates of compliance with certain federal statutes or regulations. The Legal Services Study found that "particularly among small private institutions, compliance with federal regulations is lagging or not complete." In such situations there are latent legal problems which, if they remain unaddressed, present potential legal exposure for the institutions.

There are hidden costs associated with failure to take appropriate legal action. The Legal Services Study states: "Many administrators also acknowledged confidentially that decisions had been made either to retain an unsatisfactory staff or faculty member, or to accept an unjustifiably high settlement, particularly if the case involved charges of discrimination, rather than pay the high costs of litigation."

The cost of legal services is related to the adequacy of local counsel. If counsel must re-invent the wheel in responding to issues such as financial exigency or discrimination, one of two things may happen: Either there may be an inadequate response, or fees are likely to be higher than those incurred by obtaining specialized counsel familiar with the particular area of law.

It is costly for the institution and dysfunctional for local counsel to devote the time required to maintaining expertise in an area in which advice is infrequently requested. In fact, concern about the quality of lawyers was the second most frequently cited problem in the Legal Services Study, especially among independent institutions: "The thrust of the problem seems to be the time and money spent educating outside counsel on the mores of higher education, perhaps particularly in remote areas . . . . The net effect of the problem is similar to that of 'high cost' – attorneys are consulted less than their clients would like."

An additional problem arises in small towns in which many church-related institutions are located. Local counsel may not be available to represent both the institution and the faculty who plan to file or defend a lawsuit.

Third, because of high costs and the adequacy of counsel, institutions infrequently seek the advice of counsel in implementing preventive steps that might avoid litigation or governmental review. Preventive law requires an early review of practices, policies and manuals. Administrators must obtain legal advice prior to making critical decisions in which there is potential legal exposure. This orderly process is not often viewed as a high priority by institutions, even though institutions routinely obtain annual accounting audits. The costs associated with the lack of review are considerable. According to the Legal Services Study,

> One senses that preventive law is not being practiced, and the price to be paid for that can never be determined. Private institutions without inhouse counsel, where the problem is greatest, are using their increasing legal budgets for outside help on urgent problems concerning everyday operations; they feel that they cannot afford the "luxury" of consulting counsel on an insurance basis.

Before offering some options for delivery of legal services, one must identify the *existing* sources of legal services and legal information already available to institutions.

III. Sources of Legal Information

Three basic sources of legal information are analyzed: (1) general sources, (2) seminars, and (3) publications. In addition, Selected Bibliographies have been prepared for other legal issues papers that contain citations to current legal literature useful to college administrators and counsel. This section III is not intended to serve as an exhaustive coverage of every source of legal information.

General Sources

These sources of legal information are provided most commonly by national educational associations to their members:

1. American Association of University Professors. (One Dupont Circle, Washington, D.C. 20036). Publishes policy positions and legal material on faculty and staff matters in its publications and in the famous Red Book, a compilation of all AAUP policy statements including those related to the 1940 Statement on Academic Freedom and Tenure.

2. American Council on Education. (One Dupont Circle, Washington, D.C. 20036). Prepares policy statements and testimony for congressional deliberations; frequently submits amicus briefs on such issues as equal employment opportunity and faculty personnel issues; and sponsors a project on self-regulation that has produced a draft statement on self-regulation.

3. Association of Governing Boards of Universities and Colleges. (One Dupont Circle, Washington, D.C. 20036). Provides seminars and a convention for board of trustee members; publishes *AGB Reports* containing articles on trustee responsibility; and publishes a set of model by-laws, trustee evaluation instruments, and a model conflict of interest statement.

4. National Association of College and University Attorneys. (One Dupont Circle, Washington, D.C. 20036). Publishes several publications, including the *Journal of College and University Law*; sponsors the Exchange of Legal Information that provides access to a collection of decisions, pleadings, and legal memorandum covering over 300 topic headings related to college and university law.

5. National Association of College and University Business Officers. (One Dupont Circle, Washington, D.C. 20036). Publishes articles on current legal issues in its monthly publication, *Business Officer*, and in its Special Reports; publishes a very valuable and inexpensive compendium, supplemented periodically, *Federal Regulations and the Employment Practices of Colleges and Universities*.

6. National Institute for Independent Colleges and Universities. (Suite 503, 1717 Massachusetts Avenue, N.W., Washington, D.C. 20036). Has established a Legal Services Review Panel that determines policy in response to specific requests for legal assistance, including judicial intervention and support of institutional litigation. Also publishes a series of monographs on tax issues and their policy implications.

Information from the following sources is available and does not require a membership status:

1. Academic Collective Bargaining Information Service. (1818 R. Street, N.W., Washington, D.C. 20009). Sponsored by several associations and provides excellent monographs and current information on labor relations and higher education. The service was developed in direct response to the need of colleges and universities for improved information so that they could cope with the arrival of collective bargaining on the campus in the early 1970s.
2. Center for Constitutional Studies. (Notre Dame Law School, Notre Dame, Indiana, 46556). Prepares monographs, amicus briefs, and congressional testimony; and conducts extensive research involving legal issues related to independent and church-related institutions.
3. Project on the Status and Education of Women. (1818 R. Street, Washington, D.C. 20009). Sponsored by the Association of American Colleges, provides background information on Title IX and other areas related to sex discrimination and the role of women.

Seminars

Several sponsors provide legal seminars for their particular constituencies. The following four sponsors provide periodic seminars and meetings designed for either college administrators or counsel:

1. Center for Constitutional Studies (Notre Dame Law School, Notre Dame, Indiana, 46556). Provides an annual seminar each fall designed for college administrators and counsel with particular reference to concerns of independent and church-related colleges.
2. Independent College Legal Information. (P. O. Box 15541, Nashville, Tennessee, 37215). Provides seminars for college administrators and counsel focusing on issues particularly relevant to independent colleges.
3. National Association of College and University Attorneys. (One Dupont Circle, Washington, D.C. 20036). Sponsors an annual convention designed to provide continuing legal education for college counsel; recently it sponsored its first continuing education regional seminar devoted to a review of current legal issues for college counsel.
4. The National Organization on Legal Problems of Education. (NOLPE) (5401 Southwest Seventh Avenue, Topeka, Kansas, 66606). Offers seminars on higher education law designed primarily for administrators from state institutions.

Periodicals

The following periodicals are of a general nature and include analyses of current legal developments:

1. *The Chronicle of Higher Education*. (1333 New Hampshire Avenue, N.W., Washington, D.C. 20036). The weekly source of higher education news reports selected current legal developments.
2. *Higher Education and National Affairs*. (One Dupont Circle, Washington, D.C. 20036). A weekly newsletter published by the American Council on Education contains reports on recent litigation and federal legislative and administrative developments.
3. *Higher Education Daily*. (2430 Pennsylvania Avenue, N.W., Washington, D.C. 20037). Published by Capitol Publications,

contains reports of litigation and legislative developments.

The following sources provide specialized coverage of higher education legal developments:

1. *College Law Digest*. (One Dupont Circle, Washington, D.C. 20036). Published bimonthly by the National Association of College and University Attorneys, summarizes college legal developments with special emphasis on pending litigation and unreported state cases; the publication is available to non-members on a subscription basis.

2. *The College Student and the Courts* and *The College Administrator and the Courts*. (P. O. Box 8492, Asheville, North Carolina, 28804). Published by College Administration Publications, Inc., on a subscription basis, contain reports of higher education cases with particular reference to student issues.

3. *College and University Reports*. (4025 W. Peterson Avenue, Chicago, Illinois, 60646). Published by Commerce Clearing House, is a loose-leaf service with weekly reports. It is expensive and primarily directed toward research proposals.

4. *Journal of College and University Law*. (One Dupont Circle, Washington, D.C. 20036). Published quarterly by the National Association of College and University Attorneys, contains analytical articles on developments in higher education law. The last issue of the Journal, however, is dated Summer, 1977.

5. *Journal of Law and Education*. (646 Main Street, Cincinnati, Ohio, 45201). Published quarterly by Jefferson Lawbook Company and covers elementary and secondary education and higher education.

6. *Lex Collegii*, A Newsletter for Independent Higher Education. (P. O. Box 15541, Nashville, Tennessee, 37215). Designed for independent institutions and published quarterly by Independent College Legal Information, contains detailed analysis of selected legal issues affecting independent colleges and universities.

7. *NOLPE School Law Reporter*. (5401 Southwest Seventh Avenue,

Topeka, Kansas, 66606). Published by The National Organization on Legal Problems on Education (NOLPE), contains a section that reports on recent higher education cases.

8. *Yearbook of Higher Education Law.* (5401 Southwest Seventh Avenue, Topeka, Kansas, 66606). Published annually by NOLPE, contains a review of higher education cases for the year of publication.

IV. Delivery Models

There are three basic legal functions for which options are required: (1) counseling, (2) advocacy, and (3) continuing education. Improved strategies for advocacy at the national level are the subject of the papers focusing on public policy issues.

Counseling

The prime objective of legal counseling is preventive, not fire-fighting. The problems associated with relying on local general counsel have been identified in an earlier section of this paper. A few colleges employ inhouse counsel but most do not. Five alternative models are suggested.

First, colleges could join together in a consortium or regional arrangement for legal services. Consortia have experienced difficulties because of territorial rivalries and long distances. However, delivery of legal services pose less challenge to institutional autonomy than almost anything a consortium could offer. Colleges within an area, state, or region could provide funds to support an office to provide legal services, thereby realizing improved legal services and cost savings. Such a legal arrangement could provide preventive counseling through memos or periodic seminars for board members, administrators, and local counsel. A college could thus obtain competent legal assistance on an ongoing basis for preventive action in addition to crisis advice. At least one such consortium model is already in existence.

A variant of the consortium model might include the establishment of regional law firms supported partially by retainers paid by colleges. Ten or fifteen colleges might select a law firm and negotiate a relationship that includes the provision of advice on governmental regulation and advice regarding preventive actions.

Second, faculty and staff persons could be trained in the way law firms have trained paraprofessionals to work in specific areas. Persons on campus could be trained to deal with some of the more frequent legal problems related to governmental regulation and trained to communicate with college counsel – one of the critical problems faced by both the college and its counsel. Alternatively, colleges could employ attorneys who also serve as teachers or administrators. Such house counsel, however, must retain flexibility to obtain advice from counsel competent in specialized matters.

Third, members of the board, alumni, and friends could form part of a legal advisory committee. An alternative is for individual board members, alumni, or friends to provide legal advice that supports the role of local counsel. However, such advice is often quite limited and provided only on a single topic.

Fourth, denominations could provide centralized legal services either through their own counsel or through an arrangement with a law firm. At least one model exists. A major denomination has established a legal service program that includes a law firm with expertise in higher education law. The firm provides legal services to the institutions primarily on a fee for service basis, although on occasion, the denomination subsidizes such services. The law firm has a broad overview of emerging legal problems and provides consultation to colleges.

Finally, colleges or denominations could support and encourage legal audits conducted by specialists in the higher education legal area. Such an audit would include, among other things, an examination of written policies and manuals, catalogues, by-laws, charters, employment practices, and compliance with federal requirements in such areas as equal employment and financial aid reporting. Each institution would be provided an assessment that identified problems and proposed changes. The report could be submitted to the institution and to local counsel. The legal audit would be similar to those provided by accountants and identify the legal status of the institution at the time of the legal audit.

Advocacy

First, denominations or groups of church-related institutions could develop ad hoc coalitions that submit amicus briefs that raise issues of particular consequence for them. Such an effort should be viewed as a supplement to the NIICU and ACE efforts. Mississippi College sought amicus aid from several institutions. Efforts to obtain judicial advocates should be encouraged in order for church-related institutions to identify common issues and to provide a test of their capacity to join together.

The increasing prospect that colleges will be subject to compliance review proceedings offers a second opportunity for effective advocacy. Both the equal employment opportunity agencies and the Internal Revenue Service have accelerated compliance reviews and audits of institutions. When the compliance or audit team visits a college campus and requests a vast array of institutional data, college administrators may not know how to respond or whether an overly zealous staff person is requesting more information than is reasonable. Denominations, regional groups of institutions, and consortia could provide compliance monitoring teams to assist an institution in responding to a compliance or an audit review; such privately funded monitoring teams would have a breadth of perspective to provide advice and counsel – not to thwart the review, but to make sure that the rights of the institution are protected.

A group of colleges might develop an insurance type of arrangement that would cover extraordinarily high litigation costs. The colleges would make contributions based on an agreed formula, and funds would then be available to cover litigation costs. Such a program should be coordinated with existing liability coverage that compensates for the costs of defending certain lawsuits.

Finally, some colleges or groups of colleges might develop new forms of conflict management. Are the courts really best suited to resolve issues that involve the basic processes and values of the academy and in some cases its church sponsor? Collective bargaining obviously represents an alternative form of conflict management for those who elect it. Institutions could utilize arbitration panels composed of prominent persons selected by both the institution and the claimant. In several cases, one national educational organization has quietly mediated disputes between an institution and faculty members. Denominational representatives are sometimes called upon to mediate or conciliate campus disputes.

Continuing Education

Seminars designed for independent institutions and their college administrators, staff, faculty, and board members should be sponsored by church agencies. Certain denominations have provided legal symposia or panels at various meetings. The premise is simply that, if college administrators and board members are aware of emerging legal trends and regulatory demands, they will be better able to stay out of trouble and less anxious about compliance demands. Faculty and staff should be encouraged to attend on-campus seminars, for they should be familiar with the demands on the institution and particularly legal trends in regard to equal opportunity and student rights.

Trustee training has gained new prominence. Trustees today face stringent legal standards that require that they must really function as trustees. When institutions face stress, the decisions that trustees must make become increasingly tough. Since trustees face increased legal exposure, they demand that institutions provide adequate liability insurance. Several denominations have sponsored conferences for trustees that include an assessment of their responsibilities and concomitant legal liabilities. Such seminars should be sponsored for trustees of all church-related institutions.

Finally, even though there is a plethora of legal publications, very few address the needs of the small independent institutions. A brief survey of college presidents identified a need for a periodic digest of recent cases in areas such as equal employment, faculty rights, and student affairs. A reporting service could be supported by one or several denominations and made available on a subscription basis to all church-related institutions.

Conclusion

Independent church-related colleges must face up to their responsibilities for adequate legal services – adequate counsel, competent advocacy, and continuing legal education. Denominational executives should be kept informed of campus legal developments with particular reference to those that impinge on church sponsors. Issues related to constitutional questions, property, and exposure of church boards and agencies are crucial to the church sponsors. As colleges grope for responses to equal opportunity challenges, the church's membership should be informed regarding reasons that a given college may seek employees from a broader range of the population than previously. Church leaders should provide understanding and support when institutions engage in lawsuits; they should neither apologize nor feel embarrassed if a college is sued or a collective bargaining petition is filed.

Many campus services critical to higher education today were not available a few years ago. When they were first provided, some may have viewed them as both expensive and unnecessary. Legal costs and programs are a reality for our colleges; the goal is to utilize those resources effectively.

Chapter 4

THE CONSTITUTION AND THE CAMPUS: THE CASE FOR INSTITUTIONAL INTEGRITY AND THE NEED FOR CRITICAL SELF-EVALUATION

*Edward M. Gaffney, Jr.**

Introduction

In 1952, at the dawn of the modern era of federal aid to education, a prestigious commission composed of eminent leaders in the field of higher education warned against the danger of colleges and universities becoming dependent on the federal government for financial stability. The members of the Commission on Financing Higher Education knew that regulatory conditions would be attached to federal aid, and they ventured the prediction that the long-term cost of accepting the regulatory power of the federal government in higher education would be uniformity and mediocrity. The only way to forestall such a drastic result, they suggested, was to decline federal financial support.

This conclusion has an ancient parallel in Homer's *Iliad*. Laocoon, the Trojan priest of Apollo, urged his people not to accept the gift of the Greeks: "Trust not their presents, nor admit the horse." Homer's description of the popular response to Laocoon's warning about the Trojan horse is similarly prophetic of the general reaction to the Commission's dire prediction in 1952: "All heard, and none believed the prophecy."

Since 1952 federal aid has, of course, become an essential component of the financing of higher education. A recent survey of administrators of church-related colleges disclosed that in 1978 nearly all (86.9%) of the respondents received some form of federal institutional assistance and that all of the respondents admitted students entitled to receive some federal benefit, whether in the form of a grant or a loan. It is likewise obvious that Congress has not recognized absolute immunity, for it has not placed colleges and universities beyond the reach of expanding governmental regulation.[1]

Some leaders of higher education have voiced strong criticism about the reach of federal regulation in campus life. When the Presidents of

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*This paper was prepared in May, 1979, for the National Congress on Church-Related Colleges and Universities by Edward McGlynn Gaffney, Jr., Association Director, Center for Constitutional Studies, Notre Dame Law School, Notre Dame, IN 46556. All rights reserved. ©1979, Edward McGlynn Gaffney, Jr. The paper is printed here with permission of the author.

Harvard, Yale, and Brigham Young make common cause in suggesting that the federal government is offering their institutions a new version of the Trojan horse, the entire higher education community should attend carefully to their statements. There is no need to review here the complaints about federal regulation registered within the past few years by Derek Bok, Kingman Brewster, and Dallin Oaks, for many are already familiar with the main thrust of their message. Nor is it necessary to lay out all the arguments made by thoughful commenters like Robert O'Neil, Vice-President of Indiana University (Bloomington), and Professor William Kaplin, of Catholic University of America, who have suggested that much of the complaint about federal regulation of higher education has been overstated and who have warned us all about the dangers of crying wolf. It is enough to recall this debate and to repeat Professor O'Neil's underlining of the importance "in this highly sensitive area (of dealing) with what *is*, rather than with what *might* be."

Another paper[2] on legal issues focuses on the rise of the affirmative state as the general context within which a theory of institutional rights protecting independent colleges and universities must be forged. This paper analyzes three constitutional doctrines – academic freedom, freedom of association, and religious freedom – as the basis for asserting that these institutions enjoy a special status in American law (Part I). Next, it outlines some of the practical consequences of these constitutional protections for institutional self-evaluation and for litigation and lobbying strategy (Part II).

I. Constitutional Law As A Shield For Academic Communities

A. Academic Freedom

There are two senses in which academic freedom is perceived as a value in our society. First, it is a handy phrase which sums up the protections of an individual professor or group of professors against unreasonable intrusions by other members of the college community into the professor's independence in research and publication, the professor's teaching role (including both the content and method of classroom performance), and the professor's civil rights as a citizen of the world (including extramural utterances). The classic articulation of these themes remains the 1940 Statement on Academic Freedom and Tenure adopted by the Association of American University

Professors and the Association of American Colleges. This statement has subsequently been applied to concrete disputes through the informal structure of "private government" within the academic community, which generally takes seriously any allegation of breaches of academic freedom. Through this process a body of customary law and interpretive commentary has developed since 1940.

Courts have frequently relied on this body of customary law in adjudicating claims of violation of academic freedom. For example, in public funding cases such as *Tilton* and *Roemer*, the Supreme Court has often referred to the AAUP-AAC Statement as a touchstone in determining the permissibility of the funding in higher education, for the Court has repeatedly invalidated similar funding for church-sponsored elementary and secondary education on a theory that academic freedom is not a predominant feature of education at these levels. Academic freedom has also become a legal doctrine by means of lawsuits in which faculty members suing institutions of higher education have succeeded in persuading courts to take into consideration the AAUP-AAC Statement and other policy documents in adjudicating their claims. Although the Supreme Court has never elevated academic freedom to the status of an independent constitutional right, the Court has frequently asserted that academic freedom is a significant value which must be given serious consideration in the adjudication of cases involving the rights of professors.

A second aspect of academic freedom has emerged from a series of cases in which a threat to academic freedom was posed not because of a conflict between an administrator and a professor but because of a claim that the federal or the state government had unreasonably intruded into the affairs of the academy, thereby jeopardizing the integrity of this community. For example, in *Meyer v. Nebraska*[3] the Court invalidated state legislation which prohibited the teaching of the German language. In *Epperson v. Arkansas*[4] the Court struck down a state law which forbade the teaching of "the theory or doctrine that mankind ascended or descended from the lower order of animals." Neither of these cases mention the phrase academic freedom, but both may be viewed as setting limits on governmental control of the curriculum. In cases like *Pierce v. Society of Sisters*[5] and *Wisconsin v. Yoder*,[6] the Court did not even allude to academic freedom in its opinions, but it did assert limits to monopolistic or exclusive control of the educational process by the government. The major cases in which the Court has made direct use of the notion of academic freedom have involved the right of teachers to be free from excessively broad loyalty oaths,[7] governmental investigations,[8] and intrusive or overbroad invasions of teachers' rights of associational privacy.[9]

The fundamental character of academic freedom as a safeguard against governmental thought control is stressed in the famous dictum of Chief Justice Warren in *Sweezy v. New Hampshire*:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[10]

The *Sweezy* case involved a broad-ranging investigation of state university professors conducted by Louis Wyman, then Attorney General of New Hampshire, also serving as a one-member "legislative committee" to ferret out subversive activity of all sorts. Wyman pressed Professor Sweezy for a host of details concerning the professor's personal life, academic career, political opinions and beliefs, and memberships in various organizations, including the Liberal Club at the University of New Hampshire. Professor Sweezy answered most of the questions, making it plain, for example, that he had never been a communist, had never advocated the violent overthrow of the government, nor had knowingly associated with communists in the State of New Hampshire. When asked to give full details of a lecture he had delivered as a professor at the university, Sweezy repeated these categorical denials but refused to supply further information about the lecture. In a separate concurring opinion, Justice Felix Frankfurter wrote that Sweezy properly refused to disclose information about his lecture, for as Frankfurter put it, "grave harm result(s) from governmental intrusion into the intellectual life of a university . . . . For society's good – if understanding be an essential need of society – inquiries into (areas of scholarship), speculations about them, stimulation in others of reflection upon them must be left as unfettered as possible."

Justice Frankfurter cited a remonstrance of professors in South Africa protesting the denial of academic freedom in that country for the principle that a university must preserve intact four essential freedoms: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

The questions of what may be taught and how it shall be taught were, of course, squarely presented in the *Sweezy* case and were answered decisively by the Court in favor of the autonomy of the university. It is difficult to imagine in today's academic world that governmental thought control would be exercised with the clumsy leaden quality of a Louis Wyman. At least one recent congressional enactment, however, suggests that educators must pay careful attention to subtle as well as obvious forms of governmental control of the curriculum. Section 771 (b) (2) of the Health Professions Education Assistance Act of 1976 conditioned the receipt of capitation grants by American medical schools on their willingness to insure that up to half of their first-year residency internship programs would concentrate on primary or general health care rather than on one of the medical specialties. A telling argument can no doubt be made for this assignment of curriculum priorities, but the debate over the wisdom of this policy should occur on a much more local basis than is possible when a uniform rule is mandated on all medical schools by Congress.

It is not clear that all forms of governmental regulation of academic esearch would necessarily have the effect of diminishing, let alone destroying, academic freedom, Most educators would probably agree, or example, that their autonomy and integrity were not jeopardized by he recent H.E.W. guidelines concerning the protection of human ubjects in federally funded research. A closer question, however, is resented by proposals to regulate research into recombinant DNA, or some of these proposals would have the government forbid such esearch altogether. In short, the Trojan horse syndrome of dire consequences disguised in seemingly innocuous gifts may recur today in the orm of federal legislation and administrative regulations.

The same congressional act referred to above contained another rovision which raises legitimate concerns about the ability of the cademic community "to determine for itself . . . who may be admitted o study." Section 771 (b) (3) of the act conditioned receipt of federal apitation grants on a willingness of medical schools to admit into their second-year program American students who had completed two years in a foreign medical school and who had passed the first part of a nationally administered examination for medical students.

Once again, a strong case can be made both for expanding the number of doctors in this country and for a policy which integrates into our medical schools those students aspiring to a career as a physician but unable to land a seat in an American medical school because of the scarcity of seats in relation to the number of applicants for them. It hardly follows, however, that the Secretary of H.E.W. is competent to make a concrete determination about placement of medical students. Nor is it clear that it is constitutionally permissible for the Congress to decree that the Secretary has the power to make this determination. Even if this condition on the grants were held to be a constitutional exercise of the spending power, Congress was ill advised to require admission of medical students *irrespective of their academic qualifications*. It is highly unlikely that Congress will ever enact a sweeping entitlement of all persons who meet a minimal standard to receive the benefits of a federally funded medical education. Absent such an enactment, Congress should leave the business of the selection of students in the hands of the academic community.

The explosive response of the academic community to this provision was predictable. As Robert Rosenzweig has written,

> President Paul Reinert of St. Louis University urged President Ford to veto the bill because of this provision, and Presidents Kingman Brewster of Yale and Richard Lyman of Stanford spoke forcefully against it, indicating that their institutions would not accept funds that required the abrogation of their admissions standards.
>
> What had become clear to them and to others who joined the protest is that if the Congress has the power to impose such a condition for the receipt of funds and sees a sufficiently compelling reason to exercise it, then it can do so with respect to any part of the university.

Section 771 (b) (3) was repealed in the next Congress, and in its place there was enacted a face-saving compromise measure requiring medical schools receiving federal capitation grants to make a good faith effort to increase their third-year enrollment by five percent for one year, either by accommodating American nationals transferring from foreign medical schools or by following customary admissions procedures. Congress appears to have learned that the academy will guard jealously its prerogative of determining the composition of its community.

If it is important to identify areas of academic life where governmental involvement is inappropriate because it would constitute a breach of academic freedom, it is no less important to refrain from suggesting that academic freedom immunizes or insulates the academic community from all forms of governmental regulation. To realize that such an argument proves too much, one need only attend to the fact that whole areas of federal regulation were created by braintrusters on loan to Washington from prestigious academic institutions. It should come as no surprise to the academy that many of the rules advocated as universal principles by the academics are now regarded as applicable to the academy. For example, scholars obviously contributed weighty arguments in favor of civil rights legislation enacted in the 1960s. It would strain the meaning of academic freedom beyond the breaking point if this freedom were asserted as the basis for an exemption for colleges and universities from an otherwise general ban on racial discrimination in employment. The concept of human dignity is not so elastic as to apply in the context of commercial employers but to be deemed inapplicable when the employer is an institution of higher learning. In short, academic freedom is not available as a legal argument to support the systemic exclusion of qualified female and minority professors from employment in institutions of higher learning.

If it is important to be careful about distinguishing areas of campus life where principles of academic freedom do and do not apply, it is likewise imperative that both the academy and the government be discriminating about discrimination. For example, one need not believe in the legitimacy of wholesale exclusion of qualified female students from access to higher education, yet insist that single-sex academic institutions violate no constitutional principle or statutory enactment. On the other hand, the federal funding of an educational program which excludes persons solely on the basis of their race, color, or national origin would violate not only Title VI of the Civil Rights Act of 1964 but also the core values of racial equality mandated by the thirteenth, fourteenth, and fifteenth Amendments, enacted after a civil war fought in large measure over the issue of racial equality.

The recent *Bakke* decision dealt with the problem of racial classifications in student admissions. Three points need to be highlighted about this case. First, it should be noted that the University of California was unsuccessful in arguing that the selection of its student body, protected by the academic freedom aspect of the First Amendment, was of such importance as to override the countervailing interest in racial equality protected by the Fourteenth Amendment.[11] Second, it is worth recalling that many of the same university presidents who opposed the congressional enactment mandating admission of foreign medical students filed an amicus brief in *Bakke* urging the Court not to interfere with their right to carry out affirmative action programs voluntarily adopted by their institutions to redress prior systematic exclusion of minority students from professional studies. Third, it must be stressed that *Bakke* involved a public institution and that independent colleges and universities should enjoy greater latitude in determining the composition of their student body. The Supreme Court did not state this in so many words either in *Bakke* or in the famous *Dartmouth College* case,[12] but it is a fair inference from both decisions that the distinction between public and private institutions of higher education remains an important one in American law. As Dallin Oaks has stated:

> An independent institution not receiving any direct assistance from tax appropriations should be free to have preferential admissions – even the kind of quotas the *Bakke* case outlawed for the University of California – to benefit racial and other minorities, if they choose to do so. The *Bakke* case does not hold to the contrary. Granted, this kind of latitude may be abused in some instances. But if private parties lack the freedom to make wrong decisions, they lack freedom indeed.

In summary, the decisions of the Supreme Court involving academic freedom have, in the words of Justice Brennan, declared that "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us." It is time for colleges and universities to assert this transcendent value as a legal defense whenever the integrity or rightful autonomy of these institutions is threatened by governmental action.

B. Freedom of Association

If academic freedom is to become a significant legal defense available not only to an individual professor but also to a corporate entity embodying the community of scholars in a college or university, it will in part be due to another fundamental constitutional theme, freedom of association. Although this freedom is not specified in so many words in the Bill of Rights, it has been recognized by the Supreme Court as a corollary of the rights explicitly protected by the First Amendment. The theory which has developed since the leading case in this area, *NAACP v. Alabama ex rel. Patterson*,[13] is that the First Amendment protects not only an individual's right to freedom of speech or assembly or right to petition the government for redress of grievance, but also concerted activity by a group to exercise these freedoms.

By articulating an independent right to freedom of association, the Court has ensured that the First Amendment guarantees will not be reduced to exclusively solipsistic concerns. Communities, as well as persons, are the objects of constitutional safeguards. As De Tocqueville observed over a century ago, the "most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them." Or as Professor Mark DeWolfe Howe wrote, many forms of private organizations in our society are though of as entitled "to lead their own free lives and (to) exercise within the area of their competence n authority so effective as to justify labelling it . . . sovereign."

The central message which emerges from Supreme Court decisions articulating a right to freedom of association is that this freedom nsulates private groups from unreasonable governmental interference with their internal affairs. Among the voluntary associations which the Court has protected in this way are labor organizations,[14] political parties,[15] civil rights groups,[16] the leadership of religious bodies,[17] and the management of banks and corporations.[18]

Although there are no decisions of the Supreme Court squarely holding that the academic community is an organization akin to those mentioned above, there is no logical reason why the protection afforded to these institutions should not also be available to institutions of higher education. To think otherwise would be to suggest that a community of scholars should enjoy less constitutional protection to act together than that enjoyed by the United Mine Workers, the Communist Party, the NAACP, the Orthodox Patriarch of Moscow or his co-churchmen in New York, or the managers of the First National Bank of Boston.

Academic scholarship is often characterized as highly individualistic, but it is no less valid a portrayal of the academic life to stress its collegial or communal character. Not even the stereotypical individual of genius category would be able to accomplish his or her fullest potential without the support of colleagues in a library or a laboratory. Hence, the academic community merits the constitutional protection which freedom of association affords to groups whose integrity is needlessly threatened by governmental action.

C. Religious Freedom

Like public and independent colleges and universities, religiously affiliated institutions of higher education can lay claim to the protections of academic freedom and freedom of association, for they are all bands of scholars working together to advance the state of knowledge. Unlike their sister institutions in the public and independent sector, however, religiously affiliated colleges can legitimately assert the protection of the First Amendment's Religion Clauses, at least to the extent that these institutions attempt to infuse religious content into their educational efforts.

The often convoluted interpretation of the Establishment Clause of the First Amendment is far too complicated a story to be told here. Ample references are provided in the bibliography for those who wish to pursue this chapter of constitutional history in detail. It should be enough to note here that any analysis of the historical meaning of the Establishment Clause must take into account the fundamental shift from a noninterventionist state as the political context of the framers of the First Amendment to the activist "welfare state" described in the paper written by Dallin Oaks and Cole Durham. Writing in the *Harvard Law Review* over a decade ago, Professor Donald Giannella observed:

> . . . the founding fathers were assuming a government of highly limited powers. They expected religion to play a part in the established social order, but also expected the state to play a minimal role in forming that order. In their view the state was to maintain the public peace and security so that individuals and groups would be free to shape their own destinies. But now that the state has undertaken the more positive role of allocating resources and actively structuring the social order, the question of how to treat religious groups and interests has become a fundamentally different one from that confronting our predecessors. To withhold studiously from religious groups all benefits flowing from governmental

> structuring of the social order will not only result in deprivations not demanded by the purposes of nonestablishment but in some cases will actually frustrate them.

Church-related colleges have fared well in the treatment of the issue of their eligibility for public financial assistance. With the exception of some scattered state court opinions invalidating such assistance largely because of provisions in state constitutions, various forms of federal and state financial assistance have repeatedly been upheld in the face of constitutional challenges. It must be noted, however, that this result has not been achieved because the Court accepted the interpretation of the First Amendment espoused by Professor Giannella and others. To the contrary, the Court has upheld aid to these colleges on the assumption that there is very little explicitly religious activity which occurs on college campuses.

Leaders in religiously affiliated higher education may have become too comfortable with the Court's stereotypical characterization of church-sponsored elementary and secondary education as pervasively sectarian and with the characterization of church-related higher education as rational inquiry pursued in the spirit of academic freedom. One serious danger presented by the Court's dichotomy of church-supported education in this country is that religiously affiliated colleges and universities may, in order not to jeopardize their public funding, conform more and more to the rationalistic mold of education which the Court appears to have blessed as the only educational endeavor worthy of public support.

To prevent this loss of religious character and identity, church-related colleges and universities must lend their support to the development of a unitary theory of the values protected by the Religion Clauses of the First Amendment. Without such a theory, the Establishment Clause will continue to eclipse the Free Exercise Clause in legal controversies, with predictably deleterious consequences for the religious integrity of church-related education. In the alternative, the warning of Laocoon about the destructive character of the seemingly innocuous gift of the Greeks may be one with important ramifications for the future of church-related colleges which depend on federal aid and state financial assistance.

II. From Theory To Practice: The Importance Of Institutional Self-Evaluation

The legal theory outlined above may be regarded as valuable if it enables or facilitates new understandings of the experiences of church-related colleges and universities. Like any theory, it need not be justified solely by reference to pragmatic or utilitarian ends. Most ideas, however, have consequences. The legal theory that private colleges enjoy a different status before the law than that enjoyed by a commercial manufacturer is no exception to this generalization.

One of the most important consequences of the legal theory outlined above is that it might generate powerful arguments on behalf of the integrity of these institutions whenever that integrity is threatened by governmental action. When the argument is framed in terms of a call for a wiser social policy, it is better made before legislative bodies. The argument may also be made in courtrooms, where it would be framed in terms of a legal defense. The utility of this theory in litigation may be limited at first because judges are fond of citing judges and, as noted above, there is not yet an abundant corpus of precedents applying these constitutional doctrines explicitly to church-related colleges and universities.

Even if the theory were of little or no practical utility in lobbying and litigation, it might nonetheless present an opportunity for colleges and universities to focus on three aspects of their life which are fundamental in importance. In short, institutional self-evaluation and self-reform which probes afresh the meaning of academic freedom, of community of scholarship, and of the religious orientation and character of higher education may be the most important by-product of the legal theory outlined above.

A. Academic Freedom

The first practical question for each institution to ask itself concerns the adequacy or inadequacy with which academic freedom is protected within that institution. The point of this kind of self-evaluation is not that a college must subscribe to every statement issued by the AAUP concerning the substantive content of academic freedom or the procedural content of academic due process. Indeed, the AAUP itself differentiates among normative rules and informative guidelines. These documents, however, merit the careful study of administrators of church-related colleges for three reasons.

First, there is close affinity between the substantive goals of higher education and the general values protected by the First Amendment. As Professor Thomas Emerson has written,

> The values sought by society in protecting the right to free-

> dom of expression may be grouped in four broad categories. Maintenance of a system of free expression is necessary (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by members of the society in social, including political, decision-making, and (4) as a means of maintaining the balance between stability and change.

Any college, whether public, independent, or church-related, aspires to fostering personal happiness, the attainment of truth, more effective participation in our democratic society, and the maintenance of balance between stability and change. The commitment of a college to these goals implies a willingness by that institution to engage in serious self-evaluation to determine whether it might enhance the substantive content of academic freedom for all the members of its community.

Second, there is a strong affinity between the general procedural norms of the academic community governing the discipline of faculty members and the general societal values underlying procedural due process in American law. Professor Laurence Tribe of Harvard has written that those two societal values are personalist and instrumentalist. The personalist perspective stresses the dignity of the human person and the inherent right to be heard in a matter which affects a person's liberty or property. The instrumentalist perspective stresses the function of a fair and full hearing in ascertaining the truth of the matter. Once again, the goals to which American colleges and universities are dedicated include the protection of the dignity of the human person and an open inquiry for the truth. Hence, it would appear fully consonant with this two-fold commitment for every college to ncorporate into its life the basic norms of academic due process widely accepted in the academic community.

Third, many church-related colleges seek to identify an explicitly religious source, guide, or goal of their institutional existence. This quest for religious identity is not irrelevant to the two-fold question of the substantive content of academic freedom and of the procedural content of academic due process. Centuries before Magna Carta and the ubsequent development of substantive and procedural due process in Anglo-American jurisprudence, biblical law had set forth clear precedence both for the concept of the dignity of the human person nd for fair and full hearings.

If church-related colleges were to engage in self-evaluation on their egard for academic freedom, setting their houses in order wherever that might be necessary, they would be giving bold and practical witness to values at the core of their institutional life. They would likewise be laying a solid factual foundation for urging the government not to lump academic institutions together with manufacturers of wiggets or of automobiles. Governmental officials might be more inclined to treat academic institutions differently if they were persuaded by the behavior of these institutions that they are not concerned solely with maximizing profitable returns on their financial investments or endowments but are truly engaged in the lofty enterprise of the quest of the human spirit for truth and wisdom.

For example, when for the first time in American legal history Regis College in Denver recently raised the defense of academic freedom in a lawsuit with the U.S. Department of Labor, it was important that the institution raising the defense was one which had maintained a firm commitment to the principle of academic freedom. The same defense raised by a college repeatedly censured by the AAUP for violation of academic freedom is bound to ring hollow in the halls of justice. When the American Council on Education recently included a section on academic freedom in its amicus brief filed in *Camenish v. University of Texas*, it was a proper party to do so precisely because of the Council's longstanding concern with protecting academic freedom.

B. Freedom of Association

There is no case explicitly applying the concept of freedom of association to the community of scholars known as a college or university but the very term "college" and its derivatives "colleague" and "collegiality" all suggest the appropriateness of this legal development. If this development were to occur, it would not constitute a major leap from precedents already applying this freedom to churches, labor unions, political parties, and commercial corporations operated on a for-profit basis. If these voluntary associations can be constitutionally shielded from governmental intrusion, colleges and universities should likewise begin to assert this freedom as a defense whenever the associational rights of its members would be infringed by governmental action.

Once again, however, the success of this argument may depend on the extent to which the college asserting the defense can itself be perceived as a champion of the associational rights of its members. For example, it has been alleged that during the McCarthy era administrators of a prestigious Ivy League college routinely handed over to the federal government information about the political opinions and party affiliations of several of its faculty members, without the knowledge or consent of those professors. Presumably, this practice has long since faded away, but if some analogous breach of privacy were to be a feature of the institutional practices of a college, it were better for all of us that such a college not be the one to advance the claim that the government may not regulate the academic community because its members enjoy freedom of association. Another example is illustrative. Many college administrators are opposed to the formation on their campuses of trade unions or their functional equivalents, professional associations organized for purposes of collective bargaining. There are many lawful ways to manifest such an anti-union policy, but if a college engages in unfair labor practices, such as denying access by union organizers to the campus under any and all circumstances, it were once again better to find another institution to make the breakthrough on freedom of association for the academic community.

The giving of this caution does not mean that a campus must admit to its fellowship groups which are organized to defeat the very goals of the institution. It is true that the Supreme Court has ruled that a state university could not refuse to recognize a radically oriented political group, the Students for a Democratic Society. It is also true that a federal appeals court recently ordered a state university to grant similar official recognition to a gay rights group. Neither precedent, however, would be binding on a private college unless that college were so inextricably bound up with the government that its action could fairly be characterized as official state action. To be sure, the state action doctrine remains one of the more nebulous areas of constitutional law. The dispersal of the fog surrounding this doctrine, or as Professor Tribe calls it, this "antidoctrine," is the work of another paper or perhaps another volume. For purposes of this paper, it should be enough to state that, in general, the distinction between public and private education made in 1819 in the *Dartmouth College* case is still commonly accepted in the courts.

Both on the basis of this distinction and because of the very concept of a voluntary association as one which controls by itself the question of who compose its membership, a private college ought not to feel compelled to grant formal recognition to groups antithetical to its goals or ends unless there is some explicit statutory authority compelling a contrary result for the limited purpose articulated in the statute.

To repeat an example used above, the National Labor Relations Act authorizes the Labor Board to conduct elections on private college campuses to determine whether a union should be certified to represent employees in collective bargaining. Unless the Supreme Court's recent decision in *N.L.R.B. v. Catholic Bishop of Chicago*[19] is extended in some future case to exclude professors at church-related colleges from coverage under the Act, the Board will retain jurisdiction over these colleges.[20] But just as this jurisdiction would not mean that the Board could infringe academic freedom by telling a college how to arrange its curriculum, so also it would not mean that the Board could infringe the freedom of association of an academic community by insisting that the college hire persons fundamentally opposed to its educational goals.

To sum up, no more than the NAACP may be forced by the State of Alabama to admit members of the Ku Klux Klan into its ranks, no more than the United Auto Workers may be forced by the N.L.R.B. to admit the representatives of Ford, Chrysler, and GM to its strategy sessions, and no more than the Democratic Party may be forced by the Federal Election Commission to admit members of the Communist Party to its ranks, may a college related to a church opposed in principle to abortion be forced by the government to grant formal recognition to a "pro-choice" group favoring easy access by potential mothers to the termination of fetal life. In short, freedom of association should function primarily as a shield protecting a voluntary association from unreasonable governmental interference, not as a sword in the hand of the government enabling it to force a group to change its membership characteristics or its institutional goals.

C. Religious Freedom

A third potential benefit to be derived from the legal theory outlined in Part I of this paper is the conscious retrieval of the religious identity of church-related colleges. If these institutions assert that some act of Congress or administrative regulation coerces them to act in a manner inconsistent with their religious beliefs or tenets, the colleges will be forced to undergo some serious soul-searching about their religious mission, purpose, goals, and character. Without such self scrutiny, a claim gounded in the Free Exercise Clause is likely doomed to defeat from the outset.

Religious freedom is not a magic mantle which may be hastily donned by a college when deemed expedient for purposes of a lawsuit but promptly discarded when thought inconvenient or an embarrassment. Under existing First Amendment precedents, if a college intends to rely on the Free Exercise Clause as a legal defense, it must be prepared to demonstrate that the statute or regulation in question coerces the college to choose between a governmental benefit and the abandonment of a sincerely held religious belief.[21] If the college can show only a vague historic link to a church body which may have fostered the establishment of a college but which has never been a moving force in the life of the campus, it is not in a very strong position to assert a religiously based objection to an otherwise valid law.

If, however, a church-related college has maintained close structural links with a sponsoring religious body, is supported to a considerable extent by the voluntary donations of members of that communion, and makes serious efforts to reflect the teachings of that religious body in its faculty hiring, student admissions and curriculum, such a college is in a good position to assert a corporate character to free exercise of religion. When asserted in this context, corporate free exercise of religion would, of course, take on overtones both of the academic freedom to advance religious ideas and of the freedom to association with peers or colleagues committed to the incorporation of a particular religious tradition in the enterprise of higher education.

Once again, an example may serve to illustrate this point. Mississippi College recently challenged the jurisdiction of the Equal Employment Opportunity Commission in an employment matter which the college asserted involved constitutionally protected religious choice and which the complainant alleged to involve unlawful sex discrimination. Because the college has substantial links with the Mississippi Baptist Convention, and because the Baptist faith permeates the campus, the college was in a much better position to assert a Free Exercise claim than would a college with only tenuous connections with a religious body and nominal commitments to the religious tenets of that body. The *Mississippi College* case also highlights the importance of coordinated litigation strategy, for this case, currently before the Fifth Circuit, is bound to have some legal ramifications for the employment policies of over 120 church-related colleges located in that area of the country.

In Part II B above, a caution was noted concerning the improbability that freedom of association would be accepted as a defense to an otherwise valid enactment if the college asserting the defense had not had a very good record of protecting the associational rights of the members of its community. Specifically, a potential conflict in litigation strategy was noted in asserting freedom of association and in engaging in unfair abor practices or illegal "unionbusting." The point must now be made that there are some religious communities which apparently view membership in a union as inconsistent with their religious tenets.

Where a college is within the statutory definition of an institutional employer allowed to exercise religious preference in its employment practices, and where its opposition to collective bargaining is grounded not on economic or social theory but on a sincerely held religious conviction, a more difficult challenge to the jurisdiction of the N.L.R.B. would be presented than that presented in *N.L.R.B.* v. *Catholic Bishop of Chicago*, for the official teaching of the Catholic Church has since 1891 consistently supported the right of workers to organize and to bargain collectively. If such a case were to arise in the future, the college could not rely on the *Chicago Bishop* case as precedent, for that decision was based on statutory interpretation rather than on First Amendment considerations. It would not be necessary, however, for the institution to bend over so far to accommodate the associational rights of its employees that it would erode the authenticity of its religious character in the process. In short, such a case would represent a genuine conflict between competing associational and religious interests, each of which is important but neither of which can be absolutized.

In Part I of this paper it was suggested that the Trojan horse syndrome may lurk beneath the question of permissibility of public financial assistance to church-related colleges. As long as the courts regrettably continue to adopt the posture that the Establishment Clause is more significant than the Free Exercise Clause, then church-related colleges must be ever watchful not to compromise their religious convictions, whether unwittingly or unnecessarily. To be sure, the government cannot be expected to fund activities which are explicitly sectarian in character, such as chapel services, and the teaching of the Supreme Court is that, if colleges wish to receive public assistance, they must refrain from overtly coercive tactics and even from subtle pressure exerted on students to induce religious commitment by means of coercive proselytism.

The Court did not, however, rule out authentic, unabashed witness to religious values. Hence, it would be a great tragedy if church-related colleges were to abandon such witness merely to chase after Mammon. It would be equally tragic for these colleges to accept passively the unexplained and unprincipled dictum in *Tilton* favoring Cromwellian iconoclasm of all religious symbols on or in a federally funded building. It was no less than outrageous that a Christian college in Kansas was forced to abandon a curricular requirement that graduating seniors participate satisfactorily in a religious seminar. The pressure on the college came in the first instance from a misguided federal judge, but the college also experienced intense peer pressure from several sister institutions anxious to preserve intact a state tuition assistance program.

Getting ahead by going along was not the hallmark of Jesus of Nazareth. Neither should it be adopted uncritically by colleges related to religious bodies committed to live according to his spirit. If they would heed his word in what they do, they must be prepared to render to Caesar only what belongs to Caesar, and to reserve to God the things that are His.

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Chapter 5

CONSTITUTIONAL PROTECTIONS FOR INDEPENDENT HIGHER EDUCATION: LIMITED POWERS AND INSTITUTIONAL RIGHTS*

W. Cole Durham, Jr. and Dallin H. Oaks

I. Introduction

Retold tales of burgeoning governmental presence in the field of higher education have become a familiar and doleful litany among educators in this country. The cost of implementing federally mandated social programs at the university level has been estimated at 5 to 18 percent of tuition revenues, which exceeds the total amount of all voluntary giving to institutions of higher education in the United States. And of course, the costs are not merely financial. Faced with mounting financial pressure, private institutions are being driven to make themselves over in the image of state universities to facilitate obtaining access to state and federal largesse. In order to avoid the curse of being deemed "pervasively sectarian" by the Supreme Court and thus made ineligible for state aid, many religiously affiliated institutions have bcome pervasively secular instead. The temptation to hide a theological faculty under a bushel seems overpowering when the alternative is loss of public assistance to other parts of the college. In its long range environmental impact, the resulting homogenization of independent colleges is likely to be devastating for the tradition of American pluralism.

The growing influence of government on independent college and university campuses is only one aspect of a much broader historical phenomenon: the transformation of the minimalist "night watchman state" of classical liberal theory into the modern corporate-welfare state. Although the resulting state institutions have seldom been as terrifying as Hobbes' image of the "leviathan state," they have become infinitely more sprawling and pervasive – like a vast and irresistable security blanket. We have become denizens of the "affirmative" or "performance" state.

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Almost without our being aware, the changed institutional landscape has altered the contours of our consciousness, revising the context in which rights are asserted and reshaping assumptions about the proper role of government. The very meaning of rights has been transformed in the process. The eighteenth and nineteenth century focus on achievement of political rights has expanded to embrace concern for social and economic rights. Rights themselves are increasingly viewed not merely as entitlements to state protection for various types of social goods independently acquired, but as direct claims against the state for provisions of such goods. The right to equality, for example, which was originally conceptualized solely in terms of equality of opportunity, has gradually been transmuted into a demand for equalization of material and social circumstances. And the state, quite naturally, is expected to perform the equalizing.

To be sure, the escalating regulatory burdens on independent institutions are at least partly attributable to the increasing complexity and interdependence of modern civilization. Moreover, government regulations usually seek to promote worthy goals. If the proliferation of government requirements, however, is allowed to overburden the independent university tradition, we may ultimately find that official efforts to achieve the *material* conditions of freedom have undermined institutions that are crucial to preserve the *intellectual and spiritual* conditions of freedom. The growth of the performance state means that an increasing percentage of individual income is taxed to pay for the state's efforts to equalize social and economic conditions. Resources which once might have gone to the support of independent education are now diverted to support social and economic causes less directly related to the life of the mind.

If this danger is to be countered, constitutional doctrines forged to restrain the minimalist state of the eighteenth and nineteenth centuries must be transformed to restrain the greatly expanded governmental institutions and powers of our own day.

A full exploration of these issues would require a depth and breadth of constitutional analysis far beyond the scope of this paper. Our aim is simply to suggest two general conceptual approaches to placing appropriate constraints on governmental regulation of higher education. The first would revitalize the traditional but currently neglected constitutional doctrine that the federal government is a sovereign with limited powers. The second would build on recent legal developments in civil rights and First Amendment litigation to define a theory of institutional rights which would reinforce the efforts of private institutions to preserve their diversity and to protect the independence with which they perform their educational mission. Both of these approaches reaffirm ways in which our constitutional heritage is and should be protective of independent higher education in the altered context of the performance state.

II. Revitalizing the "Absence of Power" Perspective

During the first 150 years of our constitutional history, the central premise of constitutional law was that the federal government was a sovereign of limited powers. For the most part, the constitutional analysis of that period focused not on questions of individual rights but on whether there was a constitutional grant of power which authorized a challenged governmental activity. Individual liberty was protected not by direct assertion of individual rights but by strict delimitation of the scope of federal powers over the private sector. With the emergence of the affirmative state in the aftermath of the great depression and World War II, this "absence of power" perspective was replaced in legal consciousness by a mode of thought which placed rights rather than powers at center stage in constitutional analysis. The older and narrower readings from which the orthodox doctrine of imited powers had been derived were displaced by expansive new readings of the Constitution's various "enumerated powers." The commerce power, the spending power, the taxing power – all were expanded to meet the needs of the affirmative state. Lost in the process, for all practical purposes, was the notion that these powers were subject to inherent limitations which insulated the private sector from federal intervention. The original concept that the federal government presumptively lacked authority in the absence of an enumerated power was supplanted by the idea that governmental presumptively possessed power except to the extent limited by an enumerated (or at east cognizable) individual right.

This transformation in the scope of federal power is now a matter of constitutional history, as irreversible as the technological revolution. As a result of the change, we tend to view problems of excessive governmental regulation exclusively from the perspective of individual rights. We presume too readily that government action is permissible unless it ncroaches on the rights of ascertainable individuals. In effect, the ights perspective shifts the burden of proof concerning the appropriateness of an exercise of government power from the state to the ightholder. New assertions of government power are no longer suspect.

Where no constitutional right is clearly available as a shield, new assertions of government authority meet passive acquiescence.

The difficulty with the exclusive focus on rights as the crucial limitations on government power is that it overlooks the fact that governmental activity can often dilute, deter, or inhibit the exercise of individual rights without actually infringing them. The rights perspective pays insufficient attention to the need for a buffer zone – a no man's land between rights and powers – to protect fundamental liberties in the increasingly crowded world of the performance state. The absence of power perspective provides a needed corrective in this regard.

Of course, it is too late in the day to revert to nineteenth century interpretations of the federal government's enumerated powers. The constitutional landscape has been permanently altered, and classical doctrines of limited powers are now beyond our reach. What is needed is a kind of neo-orthodoxy in constitutional doctrine. Without attempting to turn back the clock, we need to revitalize the old wisdom that the protection of individual freedom often requires limiting government powers in ways that go beyond merely vindicating individual rights. We must cage the lion as well as arm the spectators. In our highly fluid yet interdependent world, we need to maintain preserves for freedom – wilderness areas, as it were, where governmental intrusion is forbidden even though no rightholders are present to object. Moreover, we must be sensitive to the possibility that excessive government "development" on terrain adjacent to established rights may inhibit as yet unasserted expressions of freedom and also withdraw from cultivation the ground from which those rights derive their sustenance.

Reemphasis of the absense of power perspective is appropriate at two levels: (1) in evaluating agency authority to promulgate regulations pursuant to valid Congressional enactments and (2) in analyzing the constitutionality of the statutes themselves.

In the current regulatory setting, independent colleges have often been troubled more by administrative regulations than by the underlying statutes. All too often, the regulations are invalid because they go beyond the scope of their authorizing legislation. For instance, Title IX of the Education Amendments of 1972 provides in part that

> [no] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .[1]

The regulations HEW issues under Title IX include detailed provisions outlawing sex discrimination in the employment practices of educational institutions receiving federal financial assistance.[2] The courts which have considered these employment regulations have uniformly held them invalid on the ground that Title IX merely prohibits sex discrimination against the beneficiaries (generally students) or in the conduct of federally assisted education programs or activities.[3] This reasoning also invalidates other provisions of the Title IX regulations, which also ignore the fact that Congress limited the scope of Title IX to "any education program or activity receiving financial assistance." Instead of taking the program-specific approach mandated by statute, the HEW regulations pursue an institutional approach, prohibiting sex discrimination that occurs anywhere in an educational institution if any one of its programs or activities receives federal support. Under these overbroad regulations, even indirect support in the form of financial assistance to a single student (for example, veterans benefits or guaranteed loans) can subject an otherwise immune college to the whole panoply of Title IX requirements and sanctions. Title IX jurisdiction based on indirect support is currently being challenged in federal court by Grove City College. Application of the absence of power perspective in such litigation is likely to take on even greater importance in view of the Supreme Court's recent decision recognizing an implied private right of action to enforce Title IX's requirements.[4]

The regulatory abuses under Title IX are mirrored in the regulations promulgated under the Rehabilitation Act of 1973, as amended, which forbids discrimination against the handicapped. The language of the basic congressional enactment parallels that of Title IX:

> No other qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . .[5]

As in the case of Title IX, the HEW regulations[6] ignore the program-specific character of the legislation and seek to regulate programs or activities that receive no federal financial assistance and institutions which receive only indirect assistance.

The problems created by this approach are evident in *Barnes v. Converse College*.[7] In that case, a deaf student who had been admitted to Converse College sought a court order compelling the college to provide the interpreter services she needed to complete her course work. The court was extremely sympathetic to the position of the college, noting the potentially onerous expenditures of private funds that would be needed "to accommodate the federal government's generosity"[8] and the irony of inflicting such unjustified burdens on a college which was said to have been "in the vanguard of educational institutions which have developed programs and facilities for the handicapped."[9] Despite strong sympathy with the college's plight and "the obvious inequities inherent in the enforcement of this regulation with respect to private institutions,"[10] the court felt compelled to enforce the regulation because there had been no challenge to its validity.

If the absence of power perspective had been invoked in the *Converse College* case, the unwarranted regulatory burden at issue might have been invalidated. Such a result would have been particularly appropriate with regard to Converse College, which was clearly engaged in developing programs to assist the handicapped, though not in the precise way mandated by HEW.

In general, more aggressive application of the absence of power analysis in litigation challenging administrative regulations is likely to result not only in the invalidating of unwarranted regulations already in force but also in more circumspect drafting of future regulations. Both would be salutary.

While the absence of power perspective may have its most immediate application in curbing agency regulations, it is also significant in reemphasizing constitutional limitations on Congressional power. Despite the Supreme Court's expansion of the federal government's enumerated powers, such powers are still limited in circumstances where they collide with other constitutional powers. In *National League of Cities v. Usery,*[11] for example, the Supreme Court recently held that the jurisdiction of the National Labor Relations Board, which is rooted in Congressional power under the commerce clause, does not extend to regulating the terms of employment of state employees because the commerce power does not override the Tenth Amendment power of states to regulate their own internal affairs. Similarly, in *NLRB v. Catholic Bishop of Chicago,*[12] the Supreme Court just held as a matter of statutory interpretation that the jurisdiction of the National Labor Relations Board does not extend to teachers of church-operated schools. Recognizing the potential that NLRB regulation of relationships between churches and teachers in church-operated schools might encroach on values protected by the religion clauses of the First Amendment, the Court gave a narrow construction to the NLRB statutory authority to avoid such conflicts.

Both of these cases clearly indicate that even the reach of the seemingly ubiquitous commerce power is limited when it reaches the domain of other constitutional powers. Because unionization of college campuses is likely to become a significant issue over the next few decades, and because this process impacts on an important element of academic freedom (the structure and governance of the academic community), the courts should be extremely reluctant to allow governmental power to intrude into this sensitive area.

Expansive federal powers also encounter limits when they encroach on individual rights such as freedom of religion, freedom of association, freedom of expression, and the like. Since the scope of these rights in affording protection to church-related colleges is treated in another paper,[13] their precise content need not be discussed here. There is an important sense, however, in which federal powers may be limited by reference *to* such rights, even when the issue is not actual encroachment *on* such rights. Regulatory authority under the commerce power, for example, may (or at least should) trail off as soon as it enters an area pervaded by First Amendment values, and not merely when the exercise of a protected right is burdened or barred. To define the limitations on a power wholely in terms of measurable encroachments on a right is to ignore the need for "buffer zones" between rights and powers.

The doctrine of unconstitutional conditions provides a good example of a constraint which limits federal power "by reference to" constitutional rights. This legal doctrine is particularly significant to independent colleges since it operates as a limitation on the spending power, which is the basis for most of the regulatory statutes impacting on higher education.

Under the unconstitutional conditions doctrine, governmental entities may not condition access to funds or other benefits in ways that force potential recipients to sacrifice a constitutional right in order to obtain the benefit. The Supreme Court articulated the objection to the imposition of such conditions in an early unconstitutional conditions case:

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constititution of the United States may

thus be manipulated out of existence.[14]

The unconstitutional conditions doctrine has been applied to invalidate conditions on the use of public property and facilities,[15] the receipt of welfare-related benefits,[16] government employment,[17] criminal sentencing,[18] and a variety of other government programs or activities. The Supreme Court has been particularly adamant in its refusal to sustain conditions upon public benefits if they "inhibit or deter the exercise of First Amendment freedoms."[19] Conditions which directly burden such rights can be sustained only if they are justified by a compelling state interest.[20]

Since independent colleges – especially church-related ones – are intimately involved in the assertion, cultivation, and transmission of First Amendment values, they are uniquely situated to avail themselves of the doctrine of unconstitutional conditions. Whatever additional constitutional rights might be relevant to the protection of various aspects of the life of a university community, it is clear that a variety of First Amendment values – freedom of speech, of association, and often, of religion -- are central. Indeed, as one author has expressed it, the university

> is the principal institutional focus of American intellectual life. The university constitutes the primary forum for the discovery of truth and the unearthing of new principles; within it are conducted the research, scholarship and teaching that form the basis of the development of all knowledge. The university is, in sum, the single institution in American society that exists solely to nurture and pursue the values enshrined in the First Amendment.[21]

Clearly, if the federal government attempted to impose conditions on spending programs that directly violated an independent college's First Amendment rights, such conditions would be invalid.

An even broader argument can be made on the basis of the doctrine of unconstitutional conditions, and it is at this juncture that the absence of power perspective becomes crucial. Essentially, the notion is that because First Amendment values are so pervasive in the life of independent and especially church-related college communities, the spending power must be exercised with greater than usual restraint in this area. The effect is to create a wider "buffer zone" by reference to First Amendment rights.

To see precisely how this notion would function, it will be useful to examine briefly the constraints that are assumed to limit the normally broad discretion of Congress to impose conditions on spending programs where direct infringement of fundamental rights is not involved. Where a condition is imposed solely under the spending power, and not pursuant to any of the other enumerated powers in the Constitution or its amendments, there are persuasive reasons for holding that the condition must at least be reasonably related to the ends of the funded program. Otherwise, the condition is "unreasonable, arbitrary or capricious" and thus violative of due process. Thus, if Congress decides to fund a particular type of ROTC program, there should be no objection to conditions designed to assure that the federal funds are actually spent for the type of program Congress intended to establish. But a college should not be pressured to establish an ROTC program in order to avoid jeopardizing federal funding to other parts of the university.[22] In such a case, there is no reasonable relationship between the condition and the funding.

The difficulty, of course, is that the reasonable relationship standard is notoriously lax. Often, what is merely a conceivable relationship will be deemed sufficient to meet the test. In recent years, however, the Supreme Court has applied reasonable relationship standards in other areas – notably in litigation involving the equal protection and due processes clauses – with appreciably greater strictness when important constitutional values have been involved.[23] As applied in these settings, heightened scrutiny under the reasonable relationship standard has the effect of expanding individual rights. There would appear to be no reason, however, why equivalent heightened scrutiny could not be applied to impose tighter constraints on the exercise of the spending power. Particularly in the context of regulation of higher education, where First Amendment values are pervasive, a condition should be valid only if the government can demonstrate that there is an important and direct connection between the imposed and the purpose of the funding to which the condition is tied. Where such a showing cannot be made, the risk that First Amendment values may be impaired should outweigh the government's interest in imposing the condition.

The operation of this heightened reasonable relationship standard can be seen by considering its application to the Family Education Rights and Privacy Act of 1974 (the Buckley Amendment),[24] which conditions receipt of federal funds on compliance with various record-keeping and disclosure requirements. Compliance must occur throughout an educational institution and not merely in connection with the programs funded. Thus, under a broad reading of the Buckley Amendment, a religiously affiliated university might lose funding for construction of a science facility because of violations in connection with records covering religion courses, even though governmental aid to or regulation of the religion programs within a university would be constitutionally impermissible.[25] At least to the extent that record-keeping and disclosure requirements are imposed on non-funded programs, the government cannot establish a strong rational nexus between the Buckley Amendment conditions and the aims of the funding programs to which the conditions attach. This type of broad-gauged application of the spending power should be impermissible in educational contexts where sensitive First Amendment values may be jeopardized.

Insistence on the heightened scrutiny of a strong rational nexus test in contexts involving independent colleges or other institutions with heavy First Amendment involvement would result in significant limitations on the scope of government regulations imposed pursuant to the spending power. As a result, the sphere held open for the cultivation of First Amendment values would be maximized. Broadened in this way, the doctrine of unconstitutional conditions could become an even more potent tool for the assertion of the absence of power perspective in defense of the interests of church-related colleges.

III. Toward a Theory of Institutional Rights for Independent Colleges

The hollowness of much of modern life – the pervasive sense of alienation and anomie in a harried and complex world – has drawn increasing attention to the importance of institutions that mediate between the individual and the "megastructures" of society.[26] The growth of the performance state has made the role of such mediating institutions even more critical.

In this setting, church-related colleges and universities fill a particularly important need, not only because they are meaningful, alienation-dissipating communities in their own right, but also because they nourish a much larger network of religious communities. They are First Amendment institutions par excellence. In addition to furthering secular education, church-related colleges and universities are responsible for generating, evaluating, and transmitting ideas and values basic to American religious pluralism. The worth of the First Amendment protections that shield expression in the press, the media, the pulpit, political debates, and other settings will be seriously diminished if the seedbed of such expressions is disrupted or destroyed.

Yet despite this vital role, many church-affiliated colleges are dying. Over the past decade, at least sixty-seven have closed their doors, and another twenty-six have changed their status, either through shifts to public control or mergers with other institutions.[27] Even those which have survived physically may not have survived spiritually. Increasingly, the regulatory demands upon independent colleges tend to erode the distinctions between institutions in the public and private sectors. The Supreme Court's recognition that many such institutions are no longer "pervasively sectarian" and are thus eligible for some forms of tax support is a sad but accurate commentary on the loss of diversity. What we are witnessing in the secularist performance state are the escalating pressures for a homogenized pluralism: Every college must be pluralistic in the same way. Lost in the process is the possibility of creating distinctive institutions with distinctive atmospheres. The middle region between individuals and the state is being blanched out by this thinning of the ranks of vital contributors to America's pluralistic heritage.

These indications of loss of vitality among church-related colleges embody a profound irony. When religiously affiliated colleges complain about the financial crisis precipitated by spiralling costs and ruinous competition with state-funded institutions, they are referred to the establishment clause of the First Amendment and the associated American traditions of separation of church and state and voluntary support for religious institutions. If an independent institution cannot attract sufficient voluntary support to sustain itself, the argument runs, it ought to give way to institutions which can. The irony is that, as a practical matter, a failing private institution is supplanted not by a rival private institution with newer and more vigorous ideas but by the expanding state. Institutions which have survived for decades on the basis of voluntary support are first suffocated by the growing demands of the performance state – by steadily increasing regulatory burdens, competition from low-tuition public institutions, and mounting tax pressures on private donors – and then supplanted by state institutions which have never had to prove their viability by attracting voluntary support. The irony is compounded by the fact that the "survival of the fittest" notions which lie at the core of current anti-aid rhetoric are being employed against church-related institutions at a time when equivalent social Darwinism in dealing with social and economic ills has become anathema. Only independent and value-oriented education is compelled to make its own way in the secularist world of the performance state.

Part of the problem for church-related colleges is that although there is widespread recognition of the importance of mediating structures in modern society, the legal apparatus for protecting such structures remain primitive.

The rights perspective perpetuates a set of highly individualistic assumptions which hold that the entire scheme of constitutional values can be adequately safeguarded through the recognition and vindication of rights asserted by individuals. Yet there are important areas in which constitutional values may be left unprotected if mediating institutions such as independent colleges are not allowed to assert constitutional rights on their own behalf, as guardians of our culture and values and as protectors and speakers for individual rights. For example, a student's interest in preserving access to a distinctive type of academic environment conducive to a deepening of his or her religious beliefs and experiences can be protected only by institutions which foster that environment. Once a church-related college is forced to close, a student desiring to exercise First Amendment rights to attend such an institution is left without recourse. Similarly, faculty members who desire to pursue their work in an environment supportive of their own deeply held religious beliefs will be left to find work in an alien and increasingly secular world.

Of course, in many circumstances the assertion of rights to freedom of religion, speech, or association by an individual will be sufficient to protect all of the constitutional values at stake. But because there are important circumstances in which this is not the case, and because the appropriateness of institutional assertion of such rights and values is not widely recognized, the elaboration of a doctrine of institutional rights is urgently needed.

The importance of such a doctrine has already been recognized in other countries, most notably West Germany. Churches and a number of other mediating institutions there are now treated as bearers of fundamental rights, entitled to assert constitutional claims in defense of their own institutional autonomy. Authorities in American higher education have also recognized the need for such institutional protections. As James Perkins, the former president of Cornell University, has stated:

> Institutional autonomy is the surest guardian of academic freedom. To shift from the rules and procedures that

> academic institutions have evolved as central to the teaching-learning process and to put academic discipline, appointment, grading, and all manner of educational requirements at the mercy of the courts would mean, quite simply, that civil jurisdiction over intellectual inquiry would be complete . . . .[28]

The groundwork for a doctrine of institutional rights has been laid by our own Supreme Court, but a mature theory has not yet crystallized. The aim in the remainder of this paper is to outline how such a theory could be developed on the basis of available legal precedents.

The notion that certain mediating institutions are authorized to assert rights in the same manner as individuals has deep roots in our constitutional history. As early as 1819, in the famous case of *Trustee of Dartmouth College v. Woodward*,[29] the Supreme Court recognized that institutions of higher education have cognizable constitutional rights. In the early decades of this century, a number of Supreme Court cases brought by private educational entities affirmed the right of such institutions to exist, to be free from government controls over curriculum management and prerogatives, and to defend themselves against excessive governmental regulation, particularly where such regulation would operate to deprive interested parties of the right to obtain educational experiences different from the standard fare served up by the state.[30] Though now somewhat dated, these often-cited cases have never been overruled and appear to provide firm footing for a constitutional doctrine of institutional rights.

The real growth of legal doctrines supportive of an institutional rights theory has occurred over the past three decades. The proliferation of massive institutions in the performance state has multiplied the circumstances in which isolated individuals cannot effectively assert or defend their own rights, or in which individual interests cannot be adequately safeguarded except through protecting the autonomy of important mediating institutions. In response, the Supreme Court has displayed commendable sensitivity in allowing organizations to assert rights which once could be asserted only by individuals. The Court has also construed a number of substantive rights in ways that maximize the autonomy of certain institutions whose structure or mission is infused with constitutional values. Rules governing standing have been liberalized to make it easier for special interest groups to assert a wide range of rights.[31] First Amendment rights have been applied to protect the autonomy of churches in managing their own internal affairs.[32] The institutional integrity of newspapers and other media corporations has been protected by allowing them to assert free speech and free press claims.[33]

Even more noteworthy for the emergence of institutional rights are developments which grew out of the civil rights movement of the 1950s and 1960s. In *NAACP v. Alabama ex rel. Patterson,*[34] the Supreme Court held that the NAACP was entitled to assert the First Amendment rights of its members to freedom of speech and association in order to withhold its membership lists from state officials. In reaching this decision, the Court pointed out that requiring the rights involved to be asserted by individuals would result, under the circumstances, "in nullification of the right at the very moment of its assertion." The initial NAACP decision was followed by a number of other cases which made it clear that a broad range of institutions from labor unions to banking corporations could assert First Amendment rights on behalf of themselves and their members. The basic rational of *NAACP v. Alabama* runs through all of these cases:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment. . . . *[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters,* and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. (Emphasis added).[35]

Although not phrased in terms of institutional rights, there can be no question that the Supreme Court's decision last term in *First National Bank of Boston v. Bellotti*[36] was applying this principle when it held that a banking corporation was entitled to assert the right to freedom of political expression. Significantly, the decision was predicated on the importance of corporate political speech in informing public debate rather than on the need to protect the associational activity of individual shareholders. The Court's decision to structure its opinion in this manner reflects a recognition that there are certain contexts in which it is important to recognize the institutional rights of mediating institutions not only to strengthen indirect protection to individual rights but also to safeguard the distinctive contributions mediating institutions make to public life.

The holding in the *Bellotti* case has special significance for independent colleges being inhibited by government regulation. An independent colleges's distinctive contribution to the value formulation processes protected by the First Amendment is surely far deeper and richer than the corporate political speech granted constitutional protection in *Bellotti*. There, the First National Bank of Boston was allowed to assert First Amendment rights to invalidate a government regulation limiting corporate political expenditures. The bank could assert this constitutional right because it helped to "inform public debate" by making expenditures designed to influence the vote on public referenda. *A fortiori*, then, independent colleges (especially church-related colleges) must enjoy and should be allowed to assert First Amendment rights to challenge government activity which disrupts the internal process of college life and thereby impedes the ultimate flow of ideas and values into the stream of public discourse.

The idea of institutional rights relies on two strands of legal doctrine. The first of these involves questions of standing and asserts that institutions are authorized to assert constitutional rights both to protect their own interests and to protect the rights of third parties which cannot otherwise receive as effective or expeditious protection. The second involves the ways in which various constitutionally protected rights, such as freedom of speech, association, religion, and academic freedom, can be construed to give broad protection to the autonomy of independent colleges and other institutions whose inner workings implicate important constitutional values.

A detailed exploration of all implications of a fully articulated doctrine of institutional rights is beyond the scope of this paper. A few general examples suggesting limits on the doctrine will have to suffice. First, as to that portion of the doctrine dealing with standing, it seems clear that at some point the connections between the interests of an individual and those of an institution become too tenuous for the latter to be allowed to assert the rights of the former. Technically, the issue is one of justiciability. A statutory scheme which allowed whites to obtain larger student loans than blacks would clearly violate equal protection and might have an adverse impact on the number of blacks able to enroll in a particular college. Black students would clearly have standing to challenge the constitutionality of this scheme, but the affected college should not. Its institutional rights would not be violated by the discrimination. On the other hand, where a regulatory scheme would have the immediate or long-range impact of forcing a school to close or lose its distinctive character, the institution should be allowed to assert both its own rights and the rights of affected students and faculty which are inextricably dependent on vindication of the institutional rights.[37]

The scope of protections of institutional autonomy afforded by various substantive constitutional rights raises even more complex issues. Fortunately, these questions are explored in greater depth in another paper.[38] The significant point for present purposes is that the scope of protection should depend upon two considerations: (1) the extent to which constitutionally protected values are inherent in the internal processes of the institution and (2) the likelihood that government intrusion will disrupt such processes. Thus, where the institution in question is a church, extremely broad protection is provided. The Supreme Court has held that when doctrinal disputes or schisms within a church reach the stage of disputes as to which faction should control church property, courts are obligated to respect the institutional autonomy of the religious entities involved by refraining from intervention in the church's prescribed dispute resolution mechanism.[39] On the other hand, the scope of autonomy guaranteed is more narrowly confined and will only protect institutional prerogatives directly linked to the asserted constitutional right. In general, colleges – particularly church-related colleges – more closely resemble churches than business corporations both in the extent to which the functioning of their institutional structures depends upon First Amendment processes and in the depth of the contribution they make to national culture. Consequently, the college needs a broad umbrella of institutional rights to safeguard the delicate internal processes which are the source of so much that is important in the diversity and pluralism of American life.

Concededly, a recognition of independent institutional rights involves some problems. In virtually any context in which private institutions may assert constitutional rights, some individual in that institution may have views contrary to the positions taken by the institution itself. So it has been with the NAACP and the ACLU. (The latter's decision to represent Neo-Nazis in Chicago, for example, was opposed rather vigorously by a substantial proportion of the ACLU's constituency.) Such controversies are inherent in the life of any organization, and this fact should not disqualify the organization from constitutional protections in the furtherance of its mission. As important as it is to protect the rights of dissenters in such cases, there are many contexts in which the importance of protecting the viability and distinctive features and contributions of the institution itself outweighs the state's interest in regulating (and thereby undermining) the relationship between the institution and its participants. As has already been noted, when internecine disputes within churches are involved, constitutional law clearly demands that the institutional autonomy of religious entities be given priority over the state's interests in protecting a dissenting faction.

A variety of parallel problems involving dissenters within an academic community can be imagined. An individual may join the faculty of a church-related college, fully understanding its religious affiliation and its concern to foster an environment in harmony with a particular religious orientation, and later become disaffected from the affiliated church or its doctrines. The individual may even begin vociferously expressing his or her opposition in classroom and faculty settings. Alternatively, a dissident staff or faculty member may object to the cultivation of an atmosphere and life style opposed to abortion or homosexuality by the independent college which employs the individual. What may be done in such instances? To give the rights of the dissenter priority over the institution's right to preserve the integrity of its distinctive mission would compel acquiescence in the kind of homogenized pluralism that has become standard in state universities. It would also mean sacrificing the interests of other faculty members and students in preserving and participating in the college's distinctive atmosphere. At least where the institutional mission is relatively stable and clearly understood, then, the institution's rights should outweigh the interest in protecting the dissenter's position. In the long run, any other solution would seriously impair the preservation of pluralism among important subcommunities, and this in turn would undermine the richness of pluralism within the American community as a whole. Although some limitations must undoubtedly be placed on the scope of an institution's rights when these collide with those of an individual, protection of a dissenter's rights should not be pursued with such vigor that the distinctive values promoted by the institution are lost in the process.

There are various settings in which a well-developed theory of institutional rights could be useful in limiting government regulatory activity. For example, a university administration confronted with regulations arguably unconstitutional on academic freedom grounds because they interfere with normal faculty hiring or student admissions procedures could challenge them immediately, without waiting (possibly to no avail) for affected individuals to bring suit.

Of course, like the discussion of the absence of power perspective in the preceding section of this paper, the theory of institutional rights adumbrated here is only a beginning. Much more detailed analysis is needed if the conceptual approaches suggested here are to yield viable legal doctrines capable of insulating higher education from the growing intrusiveness of the performance state. Yet at least one general conclusion can be drawn. Although we must undoubtedly sharpen our thinking about the constellation of constitutional rights available to protect independent higher education from unwarranted regulatory burdens, we should not approach the problem exclusively in terms of the rights of individual persons. We need a broader vision which recognizes both the significance of direct limitations on government power and the importance of a sensitive yet potent theory of institutional rights. This combination will strengthen the position of independent higher education in resisting the intrusions of the expanding government and proliferating control imperatives of the affirmative state.

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Chapter 6

PREVENTIVE LAW FOR THE COLLEGE OR UNIVERSITY

Roger E. Bloomfield

I bring to you today my perspective of preventive law. I serve as an assistant to the president and counsel to Wittenberg University, a college related to the Lutheran Church in America with an enrollment of 2,300 students. That a college of our size should have counsel on its staff generally is unique. Our arrangement is not without pitfalls, and it is just one year old. My president and I have yet to analyze the benefits and weaknesses of our approach. Nevertheless, I will later share some of my early evaluation with you.

The Bureau of National Affairs recently circulated a pamphlet entitled *Futurelaw 21*, a forecast of legal service delivery in the twenty first century. That analysis asserted that lawyers would become educators, training their clients to solve many legal problems through early detection, careful planning, and self help. In short, BNA says *Futurelaw 21* is preventive law much as we know and practice preventive medicine today. Colleges and universities as well as individuals should practice prevention. Let us now examine how that might be accomplished.

Preventive law, in the college context, has two facets: (1) the identification and resolution of potential legal problems inherent in the college's conduct of its academic and business affairs and (2) advocacy of those points of view which will influence legislative and regulatory outcomes in favor of the college's unimpeded conduct of its mission. My focus will be the first aspect. The advocacy is usually done by our legislative relations people.

Today, one finds that the college, like commercial enterprise, is directed by laws and regulations to an equal or greater extent than it is constrained by them. A recent Wittenberg experience offers an example. One of our professors received an Air Force contract for a small research project. The forms and certifications which comprised the contract exceeded twenty pages. We had the burden of carefully reading the minute print to determine which certificates were required, which were not applicable, and what our compliance obligations would be. Of course, the certificates referred only to sections and paragraphs of statutes, regulations, and manuals and offered no narrative of the consequences of each certificate. However, the completion of all information on these forms preceded the award of the contract.

This point also has been made by Southern Bell Telephone Company's chief executive, who remarked at a recent ABA conference, "Business today is not free . . . to choose whether it will concern itself with legal matters. It is free only to choose how well or how badly its legal affairs will be handled." He characterized his dealings with his legal department as akin to ordering a meal in a Chinese restaurant. To get what one wants, one needs someone who speaks the language, knows the cooking, and uses some judgment in putting the two together. To interpret business operations in terms of law and law in terms of business is what this chief executive expects of his company's lawyers. I suspect that each church-related college faces an equal challenge.

What also emerges from a study of the business experience with legal counsel and legal problems is an acute frustration. Business people tend to evaluate a situation in terms of risk – what are the chances that X will occur instead of Y. Lawyers do not usually give odds; thus, the conflict. While the lawyer closely related to the college and perhaps even on its staff may be most sensitive to this problem and in a better position to resolve the conflict, college administrators may want to share their frustrations with the business people on their boards of trustees. They may have some helpful notions of how to interpret the lawyer's tendency to hedge.

Since I have proposed that the college needs to have counsel to serve in a preventive capacity, I also should offer some thoughts on how colleges might secure such counsel and help them become adept at Chinese. The solution is threefold and deceptively simple: (1) identify and secure qualified legal counsel; (2) sensitize the counsel to the institution and the staff to the counsel; and (3) effectively cause the counsel and the staff to mesh legal needs with the counsel's abilities. Some might suggest a fourth step – develop an unlimited source of funds to underwrite the expense implied.

First, how does a college executive find qualified counsel? I can offer the following sources: (1) legal directories, since lawyers are now permitted to designate themselves as higher education specialists under guidelines published by the American Bar Association and some state bar associations, (2) recommendations from area and fellow college administrators who have had successful experience with particular counsel or from denominational executives with similar experiences, (3) recommendations from national and regional associations who frequently are interested in legal issues of their members and are familiar with counsel, or (4) experience with local lawyers who may be the most capable of solving day-to-day operational legal problems and who may have essential familiarity with local practice, custom, and laws which will bear upon many situations.

Whether a college should hire a lawyer for its staff or use outside counsel or both depends upon the view of whether the insider's familiarity with college practices and procedures outweighs the outsider's greater independence. That debate continues in the commercial sector. My judgment is that an inside counsel can retain independence, and an outsider can be quite dependent if the college is a significant portion of the lawyer's practice. Perhaps the more crucial point is whether the college can bear the constant expense of an inside lawyer and has adequate work to require a lawyer on the staff. After a year, I am still open on this issue, although the opportunity to participate in policy discussions certainly bears out the argument that inside counsel can spot legal difficulties and alert administrators to alternative courses of action immediately. However, I would be remiss not to observe that outside counsel can offer special expertise, anonymity when facing a government agency, and perhaps be more reassuring to trustees.

If I may assume that a qualified lawyer can be found – and I grant that to be a significant assumption – then the next hurdle is to sensitize the lawyer and the college staff to one another. This second step requires that counsel come face to face with key administrators and trustees. The lawyer's effectiveness will depend upon personal rapport between lawyer and staff. The lawyer also needs to gain a valuable appreciation for the diversity of legal work in the college climate and the unique context in which such problems must be solved. To foster such contacts, workshops and briefings for trustees and administrators may be used.

The Association of Governing Boards has been helpful to Wittenberg through its offerings for trustees. Similarly, the Lutheran Church in America convenes presidents, academic deans, business officers, and trustees from its eighteen colleges to focus on mutual concerns, including legal issues. However, my personal experience has been that I, as counsel, have had to interject myself into Wittenberg's affairs to cause documents and procedures to undergo a legal review. My president has been helpful by sending all documents requiring his signature to me if my prior review is not evident. Now, after a year's presence, such matters come in due course and on the initiative of faculty and administrators who know that such a review is essential for proper administration of Wittenberg's affairs.

Finally, one lawyer and staff are acquainted, a means must be developed to assure that the lawyer's time is used effectively. My previous private practice illustrated that some corporate administrators develop a propensity to use the lawyer as an administrative surrogate by referring even the simplest problem for "legal review." One solution to this dilemma is to request the lawyer to record who requires service and the type of service performed and to present the president with an itemized statement periodically. A more informal review may be used if the lawyer is inside counsel, but the basic technique will identify problem areas – (1) those functions which never use available legal services and (2) those persons who use it excessively.

An effective way to analyze the legal problems of a college and begin a preventive law program is a legal audit. Although some studies have suggested possible checklists for such an activity, none of the guides seems to provide comparable help to that which auditors receive from the American Institute of Certified Public Accountants. My own preliminary effort would include the following, organized by functional areas:

a. *Organization and Governance Matters*. Resolutions, minutes, appointments of statutory agents, charters, by-laws, certificates.

b. *Development*. Trusts, annuities, gift agreements, donor tax and estate planning, litigation, security transfers, property matters, federal and foundation grant agreements, registrations with state and local authorities, registrations with securities and insurance commissioners, pursuit of affairs of estates in administration.

c. *Business Office*. Personnel and labor matters including hiring, firing, contract terms, evaluations, equal employment and affirmative action, worker's and unemployment compensation, FICA exemptions, fringe benefits, ERISA, construction agreements, federal and state permits (Alcohol, Sales Tax, Tax Exemption), loan and security agreements, security transactions, taxation, federal grants administration, NDSL and state grant processing and collection, litigation, operations, security, auxiliary operations, rental properties, insurance, patents, and copyright problems.

d. *Admissions, Financial Aid, and Student Personnel*. Non-discrimination, compliance with federal and state program certifications, publications with sufficiency and as basis for student contract, FTC regulations, room and board contracts, student health services, student-funded campus organizations – authority, defamation, etc., immigration laws.

e. *Academic Administration*. Family Educational Rights and Privacy Act, academic discipline – due process, tenure, collective bargaining, faculty contracts, faculty personnel matters, consortia arrangements, agreements with other universities, modification of academic programs, short courses and seminars of non-traditional nature (canoeing, skin diving), human subject research.

f. *Auxiliary Organizations*. Liability and control issues, funding.

Such a listing certainly is not exhaustive, but it offers a start for consideration of the variety of situations.

The provisions of legal services for a college is not without cost. I thought some statistics about lawyer's fees and the average salaries of inside counsel might be appreciated. A recently published survey of the College and University Personnel Administrators reports that the median salary of the chief college legal officer is $27,400 and the third quartile break is $39,750. This survey does not distinguish between the size or type of institution but is from a significant sample. Altman and Weil, consultants to corporations and private law firms report that deputy chief legal officers of corporations with law departments of between two and ten lawyers earn on the average $53,000, and staff attorneys in the central and eastern portions of the United States (excluding New York and Chicago) earn $31,000. Associate attorneys (non-partners) in private practice have a median salary of $26,665 (third quartile – $32,336), and partners earn a median salary of $69,114 (third quartile – $93,200). Billing rates for midwest lawyers with ten years experience average $72 per hour ($45 for new lawyers with less than two years experience), and a day in federal court costs, on the average, $500.

House counsel for a college could be expected to cost $28,000 to $35,000 or more, exclusive of support services, if the lawyer has some experience. Inside house counsel also does not preclude the need for outside counsel for special expertise or where inside counsel cannot be diverted for a time-consuming matter. Such an investment in legal advice may seem costly when compared to a professor's salary. It compares favorably, however, to payment for audit services to accountants, payment for liability insurance, payment for admissions personnel or other program consultants, and payment to defend a lawsuit the legal counsel hopefully can prevent.

The $30,000 staff lawyer when equipped and furnished a secretary and essential references will cost $50,000, a sum equivalent to 660 hours of outside legal service at $75 per hour. That represents only one and one-half days per week of service if paid to outside counsel and five days per week if retained counsel is on the staff. Several colleges with which I am acquainted use counsel in dual roles and, for example, I also serve as an assistant to the president. However, I contend that the counsel will find adequate challenges to justify the lawyer's position and that a college should not anticipate diverting the majority of inside counsel's time to purely administrative functions.

Perhaps I can contribute most to preventive law on campus by recalling my experiences at Wittenberg. Before being named to my present position, I served as director of deferred giving where my training as a lawyer was helpful in planning bequests, trusts, and annuities for Wittenberg's benefit. However, during my two years in that position, I was asked frequently to contribute legal expertise to problems ranging from a revision of our governance documents to the consolidation of the seminary that had been on our campus over 100 years with a seminary of another Lutheran body. When our trustees moved to name an assistant for our president, my appointment to that position also became a convenient time to formally recognize my role as counsel.

As I noted earlier, the early months of the counsel position were ones in which I had to assert myself to prompt consideration of legal aspects of college transactions. Quite frankly, those months also were challenging for me as I learned to practice law in a context different from the commercial world in which I had experience. However, after one year, I am satisfied that most of Wittenberg's major contracts, procedures, documents, and relationships have been identified for review. Some problems have been resolved; those with less priority await attention. However, we are not able to handle legal matters in an orderly way.

I have two concerns, though, as I plan for the year ahead. The first year has been primarily a legal audit, and whether there will continue to be a sufficient amount of legal work to demand my attention is unclear. Of course, the role as legal adviser to policy sessions continues, but the need for my role as essentially half-time counsel may diminish. My other concern is that the college is incapable over the long term of bearing the expense of counsel who can return to the more economically satisfying private practice. If a college is able to remove its counsel, as it does its physician, from the constraints of the academic pay scale, perhaps that college can expect to retain experienced house counsel.

I should note that my pondering the continuing value of inside counsel for the smaller college does not imply any doubt that counsel is valuable in this setting when resources permit. This dilemma and the fact that resources often are limited support the notion that denominations or other groups of colleges may find value in sharing and supporting legal services.

Preventive law is the future for my profession and should be the focus of those planning for the continued well-being of colleges. We have become an aggressive, litigious, and increasingly regulated society. Our colleges experience the same problems that our businesses and we as individuals face. We should attempt to confront these complexities with proper counsel.

SECTION II

Public Policy Issues

Chapter 7

PUBLIC POLICY PRINCIPLES

John W. Frazer and Eric C. Watters

Introduction

The unique American relationships of college, church, and state, assured in principle by the First Amendment, are in danger of becoming casualties of inflation, "affirmative" action, and information overload. The danger is real and demands that the churches, as well as the colleges and universities, become actively involved in the development of policy initiatives, initiatives directed to the denominations as well as to government at all levels. The questions and problems are far too profound to simply acquiesce to that which is developed elsewhere.

At the risk of oversimplification, the point of crisis for the collegiate community in general, and the church-related college in particular, can be traced to the 1960s. At the same time, church-related colleges were receiving reduced percentages of their financial support from the church and from the business community. In order to be "accessible" to the students of the nation, many were forced to turn to the federal government for financial help. As that help was given and as inflation, civil rights, consumerism, and other societal pressures grew, the demands for accountability also expanded. Those demands were accommodated by developing regulations which established measures of uniformity, uniformity which attacked the essence of the system assured by the First Amendment. The conflict and tensions are very real.

Current Situation

Virtually all of the church-related collegiate institutions and the denominational associations hold membership in the National Association of Independant Colleges and Universities (NAICU), an organization representing the interests of the independent institutions at the national level. The colleges and universities have also banded together in state associations in order to have their interests represented in the states. These organizations have been productive and have brought independent collegiate institutions across the country together in common endeavors.

The 1979 Public Policy Statement of NAICU, which was unanimously adopted by the membership at the annual meeting of the group in

February 1979, reveals the breadth of interest and sensitivity to national concerns that this organization represents. The Public Policy Statement deals with five areas of critical importance to the nation and to the institutions: (1) student assistance, (2) categorical institutional assistance, (3) tax policy issues, (4) government regulation/self-regulation, and (5) corporate and foundation policies.

A careful reading of the NAICU Policy Statement reveals not only the thoroughness of the presentation but also the fact that there are pervasive special concerns of the church and its related institutions that cannot and should not be addressed solely by NAICU or any other organization. These policy concerns must be addressed by each denomination and each institution. This paper on public policy should not be viewed as competing with NAICU. Rather, it seeks to complement and extend the important public policy discussions and positions of NAICU, its Board, and its membership.

In the public policy arena the concerns of any organization involved in the process are of necessity bifocal in the sense that its concerns are both offensive and defensive; there will be some things it would like for the government not to do. The unique First Amendment questions that must be considered by church-related colleges add a special dimension to the process. These colleges and their denominations are highly diverse. They represent widely differing points of view and range over the entire spectrum of the liberal-conservative band in educational objectives, theological interrelations, and governance patterns. They are, however, committed to the principles inherent in the Judeo-Christian ethic and to the concept that diversity or pluralism, under the law, is inherently good.

There are thus two kinds of public policy considerations on which to focus: those which "emanate from" and those which are "imposed upon." Each of these can be considered in the context of the five public policy platforms of NAICU. In each of the five areas there is also the very real prospect that serious conflict may arise.

The first kind of public policy is that which comes from outside the institutions and denominations and which is essentially national in scope, although there is increasing state involvement. This kind of public policy has historically been derived from the First Amendment guarantee of freedom for religious expression and the generally accepted, although not constitutionally-stated, desirability of diversity in higher education. These freedoms are increasingly in conflict with the initiatives of federal and state government to pass legislation on urgent social issues. Evidence of this conflict is readily apparent in areas such as hiring practices at church-related colleges, First Amendment appeals from compliance requirements of affirmative action legislation, taxability of unrelated business income, and the possibility of voluntary payments in lieu of property taxes to defray the cost of community services.

The second kind of public policy is that which is initiated by the institutions and denominations themselves and which is directed primarily to the constituency of the organization. This kind of policy has largely been directed to the encouragement of volunteerism and participation in the activities of the organization. Increasingly, it conflicts with federal and state regulations related to consumerism and tax policy. The conflict emphasizes the need to preserve volunteerism and to encourage tax incentives for private giving.

The evidence of conflict in both areas of policy is apparent in the growing imbalance in the relationships among the federal government, the state governments, and both the church, and the church-related college. Thus, the real issue in both public policy areas is the question of what should be the relationship between the government at various levels and the local institutions of church and college. It is increasingly clear that, in the absence of a public policy framework from which to respond to these issues, the current trends will be exaggerated with the inevitable result of greater imbalance in favor of the state.

The resolution most appropriate for the church-related colleges, and indeed for the churches can take two forms. First, we must increase emphasis on local institutional and denominational initiatives of self-regulation and trustee responsibility. Second, we must increase initiative for financial support through a maintenance of tax exemption for the institution and tax deductions as an incentive to volunteerism.

Conceptually, this calls for a renewed emphasis on the federal nature of our relationships, an historical relationship confirmed by the Constitution that assumes there is power and authority at both the national and local levels. This conception is particularly appropriate for a group to stress in its own relationship with denominational constituents since there is a clear need for agreement and direction from the top and for wide latitude of significant and meaningful difference at the institutional and denominational level.

Illustrative of this need for clearly directed policy is the enactment of the Middle Income Student Assistance Act of 1978 which, together with its supporting appropriations act of 1978, dramatically modified the role of the government in student financial aid. The full extent of the change(s) will not be known until the estimated 1.5 million additional students from middle income families made eligible for grants and the unknown number of students who may take advantage of the interest subsidy benefits in the Guaranteed Student Loan Program actually move into the financial aid marketplace. We do know that the passage of this legislation is a major step forward in realizing an oft-stated federal policy objective of assuring accessibility for all Americans to all of American higher education. The program will benefit many individuals, many institutions, and much of society. It responds well to the needs expressed by the National Association of Colleges and Universities in their policy objectives of both 1978 and 1979. It is, however, one more step in a series of reactions or responses to given needs at a particular point in time (in this instance the tuition credit tax proposals which flourished in 1978). It is important at this time in history to carefully re-examine the implications of the "accessibility" objective since similar policy concerns related to direct institutional aid, tax policy, governmental regulations, self-regulation, and volunteer leadership are having increasingly greater impact on the total higher education enterprise and especially on the church-related part of the independent sector. It is imperative to articulate general policy objectives against which operational programs can be tested. Such policy objectives must be congruent with the First Amendment to the Constitution, and they must encourage the development of individual and corporate responsibility and commitment.

Recent attempts to use macroeconomic policy to stabilize economic development seem to suggest that policy is impotent. In the economic area, monetary policy, fiscal policy, and wage and price controls all have a direct effect on the lives of every individual and institution in the nation. Yet controlling the economy with economic policy is tricky business; it is like performing an appendectomy with a jackhammer. In education, policy implications are just as powerful, and they are just as misunderstood. All public policy for higher education should be designed to (1) encourage and reward individual initiative and responsibility; (2) make all segments of higher education accessible, without financial restraint to those persons capable of profiting from the experience; and (3) promote the continuance of a diverse or pluralistic higher education system.

History and Background

These suggested policy considerations derive, in large measure, from the history of American higher education and from the Judeo-Christian understanding of "responsibility" and "commitment." Responsibility and commitment are concepts that have been very much in jeopardy of late, threatened to be rendered meaningless by a society which bandies the words about with much good intention but with surprisingly little thought. Then, too, the social pattern in recent years has been to shift the burden these terms imply away from the individual, outside the self. LaPierre, in his book *The Freudian Ethic*, sensed this trend over twenty-five years ago. He attributed the development to a serious misunderstanding of Freudian psychology, with the distorted result leading to the advocacy of a maternalistic, non-initiating, dependent social framework. His insights seem remarkably cogent today, and, because they are, there is all the more reason to fear for the survival of the two important values named above, responsibility and commitment.

Indeed, these values are of particular importance to American higher education, and particularly to the church-related segment of the independent sector. The history of American independent higher education would be considerably less impressive, and perhaps even nonexistent, had not a great many individuals assumed the responsibility for a given institution's financial and intellectual health; those individuals committed themselves, they perservered, and both the institutions and society benefited. Thus, "responsibility" and "commitment" seem inherent to an understanding of independent higher education. They are even more crucial if one is to understand fully church-related higher education, for in this arena one has also to consider denominational values and influence. Here again, responsibility and commitment are fundamental. The Christian church, its variations and particularisms momentarily set aside, not only encourages but demands that its members be responsible for the conduct of their lives and that they commit themselves to the study, life, and work of the church. It is no modest demand. Nor should the demands each church-related college imposes upon itself be lacking in comparable rigor. What also must not be lacking, however, is a broad policy framework in which such institutions can operate judiciously and develop more effectively. With the federal and state governments assuming an ever larger portion of the cost of higher education, it has become critical that the higher education community work in conjunction with the government to formulate a broad set of national policies pertaining to church-related higher education. To accomplish this, of course, it is essential that one first gain an understanding and appreciation of the histories of both the private and public sectors.

The initial step in such a process is to recognize that the two sectors have not always been distinct. Indeed, while Harvard and seven of the other eight colonial colleges were founded in large part to educate sectarian ministers, these institutions also sought to serve the larger public interest by educating professional men for roles of civil leadership. Theirs was very much a public mission. Thus, while the early colleges held themselves to be sovereign powers with independent boards of trustees and serving the tenets of a particular religious creed, the same colleges received not only their charters from individual states but also financial allotments from the legislatures in those states. Although the First Amendment clearly provided for the separation of church and state, the situation which prevailed in higher education was not seen as a violation of that Constitutional commitment.

In fact, religion was officially sponsored by the government in a number of colonies. The Northwest Ordinance of 1787 declared that religion, morality, and knowledge were necessary to good government and that schools and the means of education should, in all cases, be encouraged. Indeed, the institutions and government shared in the endeavor because each shared in the commitment to education. In addition, each party recognized its individual responsibility in the matter. The educators and public leaders realized that a joint effort was demanded if the pioneer population was to subdue the land that lay before it.

Thus, the private/public distinction was esentially nonexistent in the early phases of American higher education, not really surfacing until the Supreme Court faced the dilemma of the Dartmouth College case. This case focused attention on the issue of locus of control. The politically partisan New Hampshire Court had ruled that if Dartmouth College lay beyond the reach of the "public will," it seemed alarmingly possible that the trustees of the institution might forget the public trust reposed in them and exercise their powers in such a way as to promote narrow sectarianism or even political views. The antidote for such a potentially "lethal" situation, the New Hampshire Court declared, was public control of the institution. Daniel Webster, pleading in behalf of the college, warned that the institution would lead a precarious existence if it were to be subject to the fluctuation of public opinion or to the rise and fall of political parties. He argued further that private benefactors, uncertain as to how their gifts might be spent, and scholars, wary about the stability of their academic privileges, would turn away from the college and from other colleges.

Justice Marshall's landmark decision followed in the lines of Webster's reasoning, that Dartmouth College was a private corporation and the legislature had no right to intervene in its operation. Yet although the verdict upheld the independence of the institution, it also signaled the beginnings of a clean line of separation between "public" and "private" institutions. No longer were state legislatures so eager to support colleges they could not hope to control and, as a result, Thomas Jefferson's concept of a state-supported, nonsectarian institution drew increasing numbers of advocates.

It was, however, the denominational college that prospered during the next several decades, enjoying an unparalleled rate of expansion. It was an expansion that took the core of our educational and religious culture into the uncivilized West and expanded learning opportunities in all parts of the country. These new colleges reflected the new spirit of Jacksonian democracy that prevailed during this era and once again demonstrated the values of responsibility and commitment. The church-related sector of higher education was meeting its commitment, to its creed and to its country, at a time when the public sector remained embryonic in its development.

The Morrill Act of 1862, of course, did much to influence the complexion of American higher education. Most importantly, it provided a new dimension to the diversity that already characterized the country's "system" of colleges. The newly-spawned state institutions tended to stress the "practical" branches of knowledge more directly related to the building of the economic and technical resources of a rapidly expanding nation. The private sector, on the other hand, continued to view its responsibility and commitment in terms of the liberal arts education, albeit not quite so "classical" as Jeremiah Day had envisioned. Even with this rather clear divergence of emphasis, the two sectors did not become truly distinct until mid-way through the twentieth century.

It became evident following World War II that facilities at institutions of higher education were woefully insufficient to accommodate the flood of veterans and the large, prospective college-aged population seeking to enroll. This situation, in turn, gave rise to the massive growth of statewide systems of publicly supported colleges and universities in the 1950s and 1960s, propelled by what the nation saw as its responsibility to provide higher education for all who would avail themselves of it. Thus, there was a corresponding commitment of large state and federal appropriations for facilities, faculties, research, equipment, and student aid. Moreover, the network of two-year colleges expanded at a phenomenal rate, nearly doubling in the period from 1959 to 1969.

This tremendous growth also reflected the government's commitment to provide universally equal access to higher education.

As this "golden age" evolved, the private sector found itself educating an ever smaller proportion of the nation's matriculants. Whereas in 1950 the enrollments in the two sectors were virtually even, by 1975 the private sector enrolled only one student in four. The dramatic shift in the historical balance raised concern that higher education would become, in time, a monopoly of the public sector. The rapidly increased amounts of state and federal funds that private colleges came to rely on only fueled this fear. It was from these developments that the term "state aid for private higher education" emerged nationally and became an issue of public policy. Yet while the issue is much discussed, no established policies have been formally endorsed.

Policy Objectives

The writers and critiquers of this paper believe that the concepts of responsibility and commitment must inspire and underlie all public policy developed for higher education. These concepts have served not only as the foundation of our country's republican tradition but also as the bedrock of the religious denominations which our many church-related institutions serve. So, too, must these same concepts serve to foster the rational evolution of truth in formulating public policy vis-a-vis higher education.

To date, public policy can only be termed "reactive:" Higher education policy-makers have simply responded to given situations. Moreover, policies have rarely, if ever, had aid to education as their principal objective. Instead, policy has been directed at improving the social position of specific groups, and corresponding legislation has sought to provide social mobility to the "disadvantaged." This process has, in turn, complicated the educational mission by making institutions the agents of social change. Now, with society's accelerating rate of change and the new and increased pressures facing higher education, institutions, church denominations, and governments at all levels must act together to initiate consistent policy regarding higher education. Because this imperative is particularly critical for church-related colleges and universities, we propose the following policy-making framework.

Policy decisions related to the issues of (1) student assistance (2) categorical aid (3) tax policy issues (4) government regulation/self-regulation and (5) corporate and foundation policies should reflect and embody the following principles:

A. That providing access to higher education is the responsibility of all sectors of our society: The responsibility rests not only with government, but with the church, the institution, the business or corporation and, perhaps most importantly, with the individual and the individual's family.

B. That this "three-tiered" approach (individual-family-society) to responsibility and commitment is not only relevant but crucial to each of the five policy areas listed above.

C. That the preservation and development of diversity in higher education is of extreme importance and can be achieved only through pluralism. To this end, differing responsibilities and commitments are entailed, but no one agency should be allowed to assume role or dominant support of an institution.

D. That the dedication and cooperation intrinsic to the values affirmed here are necessary to preserve and develop academic excellence, our ultimate goal. This goal, like academic freedom which is its constant partner, demands an atmosphere that is flexible and free if it is to be attained. Only a pluralistic approach to responsibility and commitment is likely to assure this liberty.

E. That flexibility and freedom also apply to the way in which any policy, once derived, is administered. Institutional differences must be recognized and honored.

The following statements express the writers' recommended policies in each of the five separate categories. In addition, the proposed policies are then related to those adopted by NAICU at its 1979 annual meeting. Then, in each case, alternative approaches are delineated.

I. Student Assistance

A. *General Policy Proposal:* We recommend that the embodiment of responsibility and commitment in public policy mandates that the ndividual assume a basic financial responsibility for his or her education beyond the secondary level. Furthermore, the individual's family must assume its share of responsibility for the care and sustenance of the individual. Finally, society (corporations, institutions, churches, and the state) must work in consort to complement the efforts of the individual and the individual's family.

B. *The NAICU position* is affirmed by the foregoing policy proposal. The NAICU statement endorsed the following operational policies:

1. The Middle Income Student Assistance Act of 1978 which continues the effort to assure financial accessibility,

2. The concept that every eligible student should receive sufficient aid under the Basic Educational Opportunity Grant, Supplemental Educational Opportunity Grant, and State Student Incentive Grant programs so that the sum of these grants, in combination with a reasonable parental contribution and institutional and state matching grant funds, will constitute 75% of total student expenses.

3. The remaining 25% to be provided through "self-help" programs to be undertaken by the student and the student's family.

The NAICU statement, as it is developed, seems to imply that an individual is, from the outset, entitled to substantial support from the government. The statement further implies that responsibility accrues to the individual only subsequent to the government's "doing its share." Thus, the statement reflects belief in the principle that higher education is every person's right.

The writers and critique members, however, argue that whether education is a right, privilege, or simply a necessity in a democratic society, it is critical that the individual take the initial responsibility for his or her education, that the individual and the individual's family commit themselves to the endeavor, and that only then society be asked to assume a reasonable share of the burden. The federal government, then, as a part of that larger society and a significant beneficiary of increased capability, may in fact act as guarantor for a reasonable percentage of the student's annual costs. the writers believe, however, that the degree of federal support should be limited for philosophical as well as practical reasons since diversity and pluralism demand diverse sources of support for higher education. They cannot be maintained if the majority of support comes from only one source. Furthermore, the writers of this paper recommend that federal funds should not be permitted to exceed one-half of the 75% that is not the responsibility of the student. Such a limitation would work to encourage diverse sources of support, to foster increased volunteerism, and to retain the pluralism that currently obtains. It is crucial, however, that the government's role be viewed simply as that of aid or contributor, not patron. The actual sharing of financial responsibilities may be no different at all, but the attitudes toward dependence and initiative which the two approaches embody are profound.

To conceive the issue in this way suggests in turn a new model of relationships between the federal government and the institutions; a model dependent upon covenants of flexible contracts openly arrived at that emphasize mutual responsibility rather than dependence and regulatory control. Such a process could emphasize the distinctive role and mission of each institution. An example of this approach might be to combine the monies allocated for the campus-based programs (National Direct Student Loan, Supplemental Educational Opportunity Grant, College Work-Study) into one amount. This amount would then be apportioned to the institutions by the Office of Education on the basis of negotiations that would recognize and honor differences in institutional role, mission, and purpose. In this way the government and the higher education community would meet as partners rather than opponents, responsibility and commitment would be shared, and the fund would serve to accomplish the aims of both parties.

C. *Alternative Approaches*

1. It would be possible, of course, for society to deny its responsibility to students attending church-related institutions. This possibility poses dangers for said institutions, and the independent sector generally, for to deprive these colleges and universities of student-centered financial aid would be not only discriminatory but also a direct threat to the diversity we, as a nation, cherish.

2. The other extreme, however, poses equal dangers. To permit the government, or society more generally, to absorb the cost of an individual's postsecondary education is to encourage dependence while discouraging commitment and initiative, values of great import to church-related higher education and to the nation.

II. Categorical/Institutional Assistance

A. *General Policy Proposal:* This paper recognizes that such support is generally within the realm of the policy framework herein forwarded. Properly understood and administered, such assistance clearly reinforces the concepts of responsibility and commitment. We therefore recommend that categorical/institutional assistance be used to complement other forms and sources of institutional assistance. Furthermore, the awarding of such aid by the government should be done so that it encourages other segments of society to contribute as well, and encourages the institution itself to commit its own resources to its growth and development. Only in this way can the larger, more complex, concepts of responsibility and commitment be addressed. At the same time, diversity and quality will be safeguarded.

B. *NAICU Policy*

1. The NAICU Policy Statement asserts the "indispensable need" for some direct form of federal support to higher education to balance indirect support through student assistance and tax policies. Direct aid is essential if institutions are to build and maintain their capacity to meet new student needs.

2. To this end NAICU endorses a "comprehensive federal 'capacity-building' initiative" which would coordinate current programs supporting construction and renovation of academic facilities, student special services, developing institutions, community services, continuing education and lifelong learning, and the proposed urban university grant program.

3. The NAICU statement also pledges support to specialized programs (The Fund for the Improvement of Postsecondary Education, etc.).

C. *Alternative Approaches*

1. Clearly, one alternative is that the government provide only direct forms of aid to institutions. Such a policy might be argued on the grounds that the likelihood of government "interference" might thereby be diminished. Yet the ability of each institution to meet the demands of stringent and fluctuating times is also diminished. Thus, although a policy that refused categorical aid might, perhaps, decrease the controlling influence of the government, it would also threaten the viability and existence of many church-related colleges and universities.

2. Another alternative is for institutions to accept only money that is designated for a particular purpose. Yet such a policy would constrain institutional freedom as it permitted the government to determine which purposes were worthy of funding.

3. A third alternative is to establish policy which would have the government shouldering an increasing amount of the church-related colleges financial burden to the growing exclusion of other sources of funding. This possibility is unacceptable, for it minimizes the advantages and strengths spawned by plurality of commitment. What must be sought is an appropriate sharing of responsibility, a sharing that strengthens and enriches the endeavor rather than permits one party to dominate and constrain it.

III. Tax Policy Issues/Corporate and Foundation Policies

A. *General Policy Proposal.* Continued pluralism of stewardship to church-related higher education depends on the right to deduct charitable gifts from one's taxable income. This practice must be maintained and expanded. Furthermore, the "balancing effect" achieved through corporate and foundation giving requires that.

B. *NAICU Policy:* The NAICU Policy Statement supports the concepts of responsibility and commitment in its tax policy and corporate and foundation policy endorsements:

1. Tax deductible gifts are an "important bulwark" in the maintenance of diversity and quality of independent higher education. The principle of tax deductible gifts should be extended to all taxpayers.

2. The government, as it enacts legislation, must be cognizant of the differing economic structures of for-profit and non-profit corporations.

3. Student assistance programs must be expanded and refined. If tuition tax credits are to be considered, they must "reflect sensitivity to both student need and the varying costs of attending institutions of higher education."

4. NAICU recognizes that ". . . rising private-sector support of higher education is required to prevent excessive dependency on governmental support."

5. NAICU calls on the corporate and foundation community to increase their support of basic research, to assume both the direct and indirect costs of funded projects and to commit greater amounts to unrestricted grants.

The writers of this paper fully endorse the several goals of NAICU that have been enunciated above. However, the concepts of generating individual responsibility and commitment need to be addressed in additional ways. We, therefore, feel that strong endorsement of deductions above the line for substantial numbers of American taxpayers, particularly those with strong church affiliations, might be very instrumental in enhancing individual commitment to support of the denominations, the institutions, and other eleemosynary institutions for the general good of all of the people.

C. *Alternative Approaches*

1. Senator John Glenn's 1978 "sunset" amendment would have phased out charitable deductions. His bill received substantial support, and similar proposals will undoubtedly appear on future legislative agendae. Such legislation seeks to stimulate the economy and to retard inflation, both worthy causes. For church-related higher education, however, the impact of this type of legislation might be catastrophic. Its enactment would almost certainly curtail diversity and pluralism, moving the United States closer to a "state" monopoly in higher education.

2. To simply leave the current tax laws intact, without altering them to encourage charitable giving, would also be errant. Colleges and universities must seek gifts from a larger spectrum of the population. Morever, gifts of a person's time and talent must be recognized as equivalent to outright financial bequests. The church-related sector of higher education must take the initiative in formulating innovative, creative tax-policy legislation that will broaden the base of responsibility and commitment that serves as its lifeblood.

IV. Government Regulation/Self-Regulation

A. *General Policy Proposal:* This reiterates the admonition of Dallin Oaks that the government should "walk on eggs" when dealing with the higher education community. But that academe has responsibilities and commitments it must fulfill to the larger society. Policy in this area, then, must again reflect appropriately shared responsibility and commitment. The federal concept of dispersed powers must serve as a countervailing force to increased tendencies toward centralization. Adversarial roles must be relinquished in favor of collaborative solutions. Effective institutional and sector self-regulation should displace the necessity of burdensome government regulations.

In particular, church-related institutions as a part of their own heritage have a special responsibility to urge the establishment and maintenance of rigorous peer accrediting agencies whose criteria for fulfilling stated institutional goals and missions are stringent. These institutions must also facilitate redress of consumer grievances and take steps to eliminate abuses in this area. Cooperation in determining responsibility, consultation in pledging commitment – these approaches are essential to a strong, rich educational system.

B. *The NAICU Policy Statement* is forceful in its warning of government over-regulation, and extensive in its recommendation for ways of pursuing institutional integrity.

1. The following statement of principle is directed to the issue of growing government "intrusion" in higher education:

> While recognizing the need for higher education leadership and governmental initiatives to achieve urgent social purposes, NAICU also believes that legislation to expand and refine federal higher education programs must be placed in the context of a determined, cooperative effort by the Congress and by the Administration to reverse the tide of government regulation which threatens to engulf American higher education, and thereby threatens to destroy the integrity, freedom, and diversity of American higher education generally, and independent higher education in particular. Under Section 432 of the General Education Provisions Act of 1979 (GEPA), as amended, the federal government is bound by the following commitment: "No provisions of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision or control over the curriculum, program of instruction, administration, or personnel of any educational institution." NAICU believes this fundamental statutory protection against government

> intrusion upon the internal administration of institutions of higher education must be maintained and enforced with regard to all federal legislation affecting higher education. To prevent violations of this principle by employees of the United States, NAICU proposes that Section 432 of the GEPA, and other federal laws as appropriate, be strengthened by amendments that will (1) explicitly match differing levels of governmental regulation and control with differing types and amounts of governmental assistance, and (2) provide specific remedies for violation of statutory protections against federal intrusion upon the internal administration of higher education institutions.

2. GEPA Section 432 should be incorporated in all new higher education legislation, and it should take precedence over other requirements for federal law.

3. Any statute that authorizes the creation of a cabinet Department of Education should (1) provide explicit and strong inhibitions against centralized planning and the control of American education; (2) assure adequate distinctions in the structure of the proposed department between policies and programs for higher education and those affecting elementary and secondary education; and (3) be sensitive to the values of pluralism and diversity of higher education.

4. NAICU urges the higher education community ". . . to accelerate the movement toward development of self-regulation initiatives."

C. *Alternative Approach*

1. There seems only one alternative to vigorously asserting the need to share responsibilities and commitments, to consult and cooperate rather than to square off as adversaries. That alternative is an ever-encroaching web of government regulation that will only deepen the dependency of higher education, robbing it of its vitality and reducing it to mediocrity.

Conclusion

The charge, then, is to accept the challenges this policy framework encompasses. To settle for a "reactive" approach to the problems and issues of the coming years is to settle for irresponsibility. It is also to risk loss of integrity, perhaps even existence itself. Therefore, the church-related sector of higher education must assume the initiative in establishing and attaining policy objectives. To do any less is to renounce our responsibility and shirk our commitment to our denominations and our country. In particular, it would seem to be a special responsibility of the church-related colleges and universities to establish, unilaterally if necessary, self-regulation initiatives that capture the moral imperatives of faith.

(The 1979 NAICU Public Policy Statement was appended to this paper for purposes of discussion at Notre Dame.)

Chapter 8

CONSTITUTIONAL AND LEGAL CONSIDERATIONS

J. Victor Hahn

This paper has been written for non-attorneys and does not advocate particular positions on current legal and constitutional debates. Rather, t is intended to provide a backdrop for other papers by outlining the legal and constitutional framework within which public policy is formulated and implemented.

The paper examines the question of constitutionality of public funding of church-related higher education, distinguishing between institutional assistance and student aid programs. It then outlines the important ways in which the legal and constitutional status of independent and church-related colleges differs from that of the public education sector and suggests several underlying public policy issues which arise from these distinctions. It also notes the potential importance of several constitutional provisions for future litigation, including the Free Exercise of Religion Clause of the First Amendment. Government regulation is then discussed from the standpoint of several key legal and constitutional principles. Finally, the paper suggests that future public policy discussions must be more sensitive and informed about the rapidly developing legal environment of church-related higher education, and it notes two encouraging signs for the 1980s.

The reader should recognize two themes running through the legal framework discussion as well as the other public policy papers: (1) What should be the role and the characteristics of diversity and pluralism in American higher education? (2) What should be the relationship of individual equity and institutional equity in higher education?

Introduction

Public policy affecting independent and church-related higher education in this country is formulated and implemented within a framework of constitutional and legal principles.

In his book *The Future of Church-Related Higher Education*, Dr. Edgar M. Carson stated that –

> The validity of the church-related college is inseparable from

> the validity of the independent college in general. If there is a case for the church-related college, there is also a case for other independently-sponsored institutions. If there is not a case for the church-related college, there probably is not a case for any other kind of independent institution.

A similar observation might be made with respect to the legal and constitutional settings of church-related and independent institutions of higher education. There are, to be sure, legal and constitutional issues which have a unique bearing on the church-related institution, such as the constitutionality of public funding or the legality of exercising religious preference in the hiring of faculty and staff at church-related colleges. Nonetheless, most of the legal problems and issues affecting church-related colleges are shared by other institutions in the independent higher education sector.

The legal issues papers are focusing on the specific components of the legal environment and constitutional framework of church-related higher education institutions. The purpose of this paper is more limited – to survey the general legal and constitutional issues which are relevant to the public policy principles highlighted in the other papers. It is hoped that this review will serve for non-attorneys as a useful backdrop against which the importance of the public policy considerations can more fully be appreciated.

I. Student Assistance and Institutional Assistance

It is clear from the paper on public policy principles and the NAICU position paper upon which it builds that government support in the form of student financial assistance has become a major public policy concern for independent higher education in this nation. Similarly, programs of institutional assistance have been developed through various categorical support programs which continue to be the subject of debate in Congress and elsewhere.

Many state constitutions impose more stringent limitations on public funding of religiously affiliated institutions than does the First Amendment to the U.S. Constitution. A government aid program which might be upheld under the First Amendment might nonetheless fail to pass muster under a more restrictive state constitutional provision.

In terms of the First Amendment Establishment Clause, the constitutionality of public assistance to church-related higher education institutions has been quite fully litigated, and the basic criteria of analysis have been outlined by the United States Supreme Court.

The so-called "higher education trilogy" of Supreme Court decisions which sketch the outlines of the constitutionality of government programs involving church-related colleges are *Tilton* v. *Richardson*, (1971), *Hunt* v. *McNair* (1973), and *Roemer* v. *Board of Public Works of Maryland* (1976). While some details remain unclear even after these decisions, the primary teaching from the trilogy is that, under that Establishment Clause, the Court will look at the institutions benefited by a government aid program and will try to determine whether the aid program has a secular purpose, has a primary effect which neither promotes nor inhibits religion, or involves an excessive entanglement of government and religion. In the cases noted, the Supreme Court focused on the nature of the recipient institutions – that is, whether or not the institutions were "pervasively sectarian." Government aid to pervasively sectarian institutions would be prohibited by the Establishment Clause. But, in general, unless an institution's educational program is thoroughly infused with policies and practices of religious indoctrination or coerciveness, the Court has been reluctant to strike down aid programs which have non-preferential incidental benefits to church-related institutions.

The Court has distinguished, not always with consistency or cogency, between elementary and secondary education and postsecondary education. It should be noted that government aid programs in the context of church-operated elementary and secondary schools have been more commonly struck down as unconstitutional.

In contrast to the "institutional analysis" (that is, is the benefited institution pervasively sectarian?) used in cases involving programs of institutional assistance, a different mode of analysis appears to have emerged with regard to student aid programs. In 1977 the U.S. Supreme Court reviewed the case of *Americans United* v. *Blanton*, summarily affirming a lower federal court decision which upheld a student aid program without requiring an examination of the nature of the institutions in which the student aid recipients enrolled.

It would appear that in *Blanton* the Court intended to confirm the notion that an aid program which assists students on a non-discriminatory basis need not be struck down simply because some students choose to enroll in institutions which might be characterized as pervasively sectarian.

In summary, there has been substantial litigation involving challenges to programs of government aid to colleges and students. While it has generally fared well in both lines of case, church-related higher education must continue to monitor developments and defend against challenges in this area. Church-related colleges should also be conscious of the pressures inherent in the threat of loss of eligibility for receipt of government aid. These pressures were recognized by Mr. Justice Stevens when, in his dissenting opinion in the *Roemer* case, he noted "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it."

II. The Independent Status of Church-Related Colleges

As was noted earlier, much of the legal and constitutional framework of the church-related college is shared with the independent higher education sector generally. The independent status of institutions is particularly important to the public policy discussions about the extent of permissible government regulation of colleges.

A. State Action

Governments and their sub-units, including state-supported higher education institutions, are subject to federal constitutional provisions, such as the requirements of due process and equal protection.

Legally and constitutionally, an independent institution is on a somewhat different footing than such public institutions. In general, the relationship of independent and church-related colleges with students, faculty, and staff is *contractual* and not directly subject to constitutional requirements.

The "state action" doctrine has emerged as a way of determining whether an independent institution or one of its programs is so closely related with the government that constitutional requirements are applicable just as if that institution or program were a government entity or activity. By and large, courts have been reluctant to impose constitutional requirements on private institutions through a finding of "state action." For the "state action" doctrine to apply, there must be a finding of substantial state involvement – something more than public funding, tax exemption, a state charter, or a state accreditation. However, some observers believe that new expansions of the state action concept may be used to subject more independent institutions to the more extensive constitutional requirements in the future. This trend is probably more likely to occur to the extent that independent higher education fails to provide basic fairness in its dealings with students, faculty, and staffs. Independent higher education might appropriately view due process and other constitutional requirements which are currently imposed on state-supported higher education institutions as guidelines for fashioning their own policies and procedures.

B. First Amendment Considerations – Individual and Institutional Equity

In addition to the legal and constitutional distinctions between independent and state supported higher education, certain constitutional provisions hold some promise for higher education in future public policy debates concerning the relationships of the government and academia.

The First Amendment protections of freedom of speech, freedom of association, and free exercise of religion could be argued to constitute a framework within which the academic freedom of the institution itself or, in the words of Edgar Carlson, the "intentional identity" of institutions could be asserted as a basis for protection against excessive regulatory intrusion by government.

One of the other papers explores the theoretical foundations of such an argument as well as its practical consequences for self-evaluation and litigation strategy of independent institutions. Suffice it to say here that this area of the law has not been litigated to any great extent, and the theories have not yet received judicial recognition in any settled way.

What *is* being litigated extensively are claims of individual equity and protection against discrimination by institutions on the basis of race, color, sex, religion, national origin, age, or handicap.

In some instances, the higher education community has been slow in according full access and fair treatment to all members of society. In light of consequent legislation enacted to ensure non-discrimination, higher education is now in the difficult position of objecting to some side effects of the vigorous enforcement of those provisions – namely, the extensive and growing involvement of the federal government in the operations of the institutions. There is a need for a more careful framing of public policy positions which may acknowledge the social value of the various statutes and regulations without forfeiting the egitimate claims of institutional autonomy which independent colleges must preserve.

One legal question which clearly reflects a public policy issue in this context is the propriety of exercising religious preference in hiring in light of the prohibition of discrimination in employment on the basis of religion provided in Title VII of the Civil Rights Act of 1964. What is the legal posture of an institution which, though not having a policy barring employment of individuals of any particular religion, sees its future identity as a church-related institution as dependent upon its ability to secure a "critical mass" of its faculty who are affiliated with the sponsoring church body and/or openly avow the stated goals of the institution?

Title VII includes several exemptions from the non-discrimination provisions – for positions in which religious affiliation is a "bona fide occupational qualification" or for institutions which reflect a close relationship with a church body or which consciously operate from a faith commitment.

Several difficulties are presented in this context. Can a college exercise religious preference in hiring without illegally discriminating against certain persons because of their religion? Can an institution claim a Title VII exemption without thereby also being deemed "pervasively sectarian" and thus ineligible for receipt of federal funds? Once again, we find that this important area of the law has not been litigated, and there is little clarity about what is permissible or prohibited.

Public policy and its framework of legal issues in this context involve a number of important questions, including:

> What is the relationship of individual rights and institutional rights?
>
> Is there a legally or constitutionally recognized right of independent institutions of higher education which takes precedence in certain instances over other social values and goals?
>
> What are the legal and constitutional implications of how society defines diversity or pluralism? (Should pluralism be found in the education system when viewed as a whole, or should each individual institution making up that system also be characterized by pluralism and diversity of faculty, staff, and students?)

We do not yet have clear answers by the courts or agreement in our society on these points. Further litigation can be anticipated as institutions feel increasingly pressed to assume responsibilities for implementation of social policy goals and to the extent that these responsibilities are viewed as impinging on the basic educational mission of the college.

The process of clarifying the constitutional and legal status of institutional autonomy and of the relationships of institutional equity and rights to individual equity and rights can be expected to be extended and complex. For this reason, the church-related higher education sector should renew its efforts in giving more careful thought to these issues.

A related constitutional topic of current interest is the concept of free exercise of religion. With increasing frequency the argument is being made that in First Amendment litigation, the "No-Establishment" clause has received more attention than the "Free Exercise of Religion" Clause, and that the latter must be accorded appropriate weight as the relationships of the government and the church-related sector are further refined. Litigation concerning the Free Exercise Clause has principally involved claims by individuals seeking accommodation of their religious beliefs and practices with government programs which allegedly impinge on those beliefs and practices; it is not yet clear just how extensive are the Free Exercise rights of institutions.

In addition, it is not yet clear what sort of institutions could successfully assert the Free Exercise Clause as a shield against specific instances of government regulation. How close must be the college's relationship with a church (or how central must be a faith commitment to the mission of the college) to legitimize a "Free Exercise" argument? Would it automatically follow that any college which could claim Free Exercise of Religion as a defense of its practices or against government regulation would also be "pervasively sectarian" and thereby be ineligible for receipt of federal funds?

Much more though needs to be given to these questions, but a too easy citation of the Free Exercise Clause as a blanket protection against inconvenient or expensive government regulations is inappropriate and should be avoided.

III. Government Regulation

As is reflected in the other papers, "government regulation" is a topic of current interest and importance for all of independent higher education. The papers are focusing on the many specific statutory and regulatory provisions having an impact on colleges, and this paper will not attempt to duplicate that survey. For clairity of certain public policy discussions, however, it is helpful to recognize and distinguish among the bases upon which government asserts regulatory jurisdiction over institutions and individuals.

A. Statutory Jurisdiction

Investigative and enforcement powers of federal regulatory agencies are delegated by Congress and therefore must be based upon some authorizing statute.

1. *"Recipient"*

A common basis upon which the federal government asserts regulatory jurisdiction in enforcing the various prohibitions against discrimination is that an institution is a "recipient" of federal funds. Three issues arising from this basis of asserted regulatory jurisdiction are of special current interest.

The first issue involves the definition of "recipient." Grove City College is challenging in federal court the propriety of H.E.W. jurisdiction under Title IX provisions prohibiting discrimination on the basis of sex because the college does not participate in any direct program of federal grants or loans. H.E.W. argues that Grove City is nonetheless a recipient of federal funds, and thus subject to regulation under Title IX, since the college enrolls students which receive federal assistance under the Basic Educational Opportunity Grant and Guaranteed Student Loan programs.

Another aspect of this jurisdictional basis of some federal regulation which has been strongly criticized by some institutions is H.E.W.'s asserted jurisdiction over all programs of an institution if one program of that institution receives federal support.

A third problem which is related to this jurisdictional basis is the provision found in federal grants and loans for the construction of academic facilities whereby federally funded facilities may not be used for "sectarian instruction" or "religious worship." A recent survey conducted by the Center for Constitutional Studies at Notre Dame indicates that federal agency interpretations and activities in this area are often inconsistent and are of great concern to many church-related colleges.

2. *"Contractor"*

Other regulations are predicated upon an institution's status as a "federal government contractor." For example, Executive Order 11246 requires of institutions which are federal contractors affirmative action efforts in the hiring of minorities and women, and section 503 of the Rehabilitation Act of 1973 requires affirmative action with regard to handicapped persons. It should be understood that affirmative action requirements are in addition to the basic prohibitions against discrimination which were noted above.

3. *"Employer"*

A third basis upon which the federal government has asserted jurisdiction over institutions of higher education arises from their status as employers. For example, the 1978 amendments which prohibit mandatory retirement policies based on age with respect to persons between the ages of 40 and 70 apply to employers of 20 or more employees. Such statutory and regulatory jurisdiction is asserted whether or not an institution receives federal funds.

B. Constitutional Framework

Under the Constitution, the federal government of this nation does not have open-ended or extensive "general police powers." Federal power and regulatory jurisdiction must be finally grounded in one of the constitutionally enumerated powers, principally, the taxing power, the spending power, or the power to regulate commerce. The Commerce Clause has served as the constitutional basis upon which the federal Congress has extended its jurisdiction, and that Clause has been interpreted very broadly by the courts to include permissible regulation of virtually all activities and institutions "affecting commerce."

IV. Public Policy and Responding to the Legal Environment

The legal environment of higher education has changed dramatically during the last decade. Higher education, traditionally viewed as being properly immunized from much of the business of litigation, has in recent years been swept into the legal process. The filing of complaints with regulatory agencies and of lawsuits in courts by students, faculty, and staff are becoming commonplace. Agencies and the courts have opened themselves to review claims and suits brought against colleges and in many instances are less willing than before to protect and insulate from legal liabilities the judgments and customs of academia.

The need for responding more effectively to this new and changing legal environment should be of immediate concern to the independent and church-related higher education sector. Careful consideration should be given to options for colleges individually and collectively to face and adjust to this legal environment, including consideration of models for improving the availability and delivery of legal services to church-related colleges.

Similarly, it must be recognized that public policy positions and the legal environment of independent higher education are interrelated. Individuals and associations which represent the interests of the independent college in the legislative and regulatory arenas need to focus as well on the legal issues and legal environment of higher education as an important dimension of public policy.

Two organizational activities are of importance for independent colleges in this regard. The first is the Legal Services Review Panel of the National Institute of Independent Colleges and Universities, the companion organization to NAICU. The Panel serves the important function of systematically monitoring precedent-setting litigation, providing legal research and memoranda, filing amicus briefs, and in other ways assisting colleges on legal matters having significance for all of independent higher education. Second, the Center for Constitutional Studies at Notre Dame University provides basic legal research, analysis, and publications, and undertakes selected advocacy activities, including the filing of amicus briefs in support of independent higher education, particularly church-related higher education. These are very encouraging signs that the independent college sector is preparing to move cooperatively and more effectively to respond to the legal environment in the 1980s.

Chapter 9

THE CHURCH, THE CHURCH-RELATED COLLEGES, AND THE STRUGGLE FOR JUSTICE

Denominations have good reason for their commitment to their church-related colleges. These colleges provide a community of scholarship and reflection which for generations has clarified the faith and deepened the understanding of their students, has developed leadership for the church, and has evidenced the Christian commitment to the educational needs of our society. These colleges have extended education to minority groups long before the broader society perceived that need. Such contributions more than justify the commitment of the denominations to their colleges.

However, when the denominations and the colleges address issues of public policy, they must be prepared to identify the contributions which the church-related colleges have made to the broader society. Only such contributions can make legitimate a demand to alter public policy so as to assure the continued health of the church-related college. This paper argues that the *system* of church-related colleges have enriched the scholarship of the academic community and have furthered the quest for knowledge. The church-related colleges represent educational assets of faculty, plant, and endowment which are irreplaceable. The graduates of these colleges have contributed skills and services which are essential to the well-being of society. These contributions would, in themselves, be adequate justification of the claims on the public policy which the church-related colleges now assert.

A neglected yet pervasive contribution of the system of church-related colleges to the American society is the principal focus of this paper:

> The system of church-related colleges is a major source of the diversity within American society which is the guarantor of a continuing struggle to right injustices. Church-related colleges are essential to the continuing quest for justice within American society.

To understand this claim, we need to examine a central assumption of our nation's founders and to explore the source of that assumption. The shapers of the American constitution were influenced by Christian anthropology, either directly or derivatively. Such anthropology affirmed both the *potential* and the *perversity* of humankind.

On the one hand, the anthropology of the founders celebrated human capacity. The human community was "endowed by the creator" with rights and capacities. The Constitution assumed that human beings were both rational and creative. Human society was capable of governing itself. Citizens of good will were believed to be able to guide their destiny by the exercise of reason. The legislative and judicial process spelled out in the Constitution assumes human rationality. Humankind is created in the image of God, and like the Creator, is capable of responsible action.

On the other hand, the founders recognized human perversity. They noted the human lust for power and the inherent self-interest which Christian theology has labeled "sin." The founders were not blindly optimistic. They included in their polity intricate countervailing forces which were intended to balance self-interests against one another as a means of assuring the general good. Multiple sources of authority, diverse centers of power, and a determination that no single perspective could prevail unchecked signaled their distrust of human perfectibility. They believed that justice would be approximated only as diverse interests pressed against one another and various commitments contended.

Though often in secular guise, this Christian anthropology has continued to shape our American culture. It is preserved in our healthy suspicion of centralized power, our struggle to preserve local initiative, our commitment to plural sources of decision-making, and our celebration of volunteerism. American culture has been most healthy when the conviction that no single individual or institution could be trusted has thrived. We live in a society which continues to base its governance upon the belief that all human enterprise, despite admirable intention, is tainted by self-interest.

Thus, our society requires diversity for the sake of justice. Only as differing perspectives, multiple visions, and plural commitments are sustained will the processes of justice continue to function. Thus, any influence which assures diversity is in the public good. Of course, many institutions and traditions contribute to our American diversity. America is an immigrant culture. America is an individualist culture which celebrates the independent thinker.

America is a collation of histories, regions, and influences. As a consequence, we have continued to approximate justice within our society because we have not lacked for countervailing forces.

The struggle for civil rights in the 1960s is still fresh enough in our memory to serve as an illustration. The black community initially protested long standing injustices. By themselves, the blacks would not have achieved the changes they sought. Yet a widely diverse coalition of groups, each guided by its own commitment, forced changes in many laws and practices. ACLU lawyers marched shoulder to shoulder with evangelical Christians; Marxist reformers joined elbows with Roman Catholic nuns. On other issues which have since emerged in our society the members of the 1960s coalition now contend with one another. The allies of the 1960s are divided on the public funding of abortion, the propriety of prayer in the public school, and the desirability of disarmament. Diversity alone assures that as yet unnoticed injustices will be addressed in the future.

The system of church-related colleges is vital to the continuing diversity of our society. In general, higher education concerns itself with the perspectives and commitments of its students. By choice, church-related education has focused on commitment and value concerns, unlike their private and public counterparts. They believe that academic communities cannot avoid the questions posed by religion, and they include in their curricula issues of faith. This commitment, coupled with the wide spectrum of denominational backgrounds, educational styles, and traditions, has produced a vast diversity of church-related colleges. Those colleges have in turn educated citizens who espouse widely differing convictions.

Of course, individual church-related colleges in some cases reflect very sectarian perspectives. The diversity we cite is a consequence of the vast spectrum of church-related colleges: It is system-wide, not necessarily resident within any one college. The system of church-related colleges provides diversity because it is unencumbered by the restrictions of state legislatures or the prevailing climate of the culture. Often church-related colleges choose to press against the prevailing mores of the culture. They are free to do so. As a system, the church-related colleges provide a spectrum as broad as that of the religious communities to whom they relate. That is their genius, and that is their claim upon the public domain.

In summary, the system of church-related colleges has a legitimate claim upon the American society. They have nurtured a diversity within American society by virtue of their protection from governmental and societal interventions. They have endowed their graduates with a multiplicity of perspectives. This gift of diversity assures that the struggle toward justice which the founders of the nation envisaged will continue.

Some might argue that diversity can shatter a social fabric. At certain moments in our national history, diversity proved to be very dangerous. The struggle which led to the Civil War was generated by diversities which could not be contained. However, American society has now moved in the opposite direction: Centripetal forces now predominate. We are pressed toward conformity. Regional distinctions are disappearing; volunteerism is floundering; ethnic communities are drifting from their heritage. Cynics have called ours the age of "mass think." Subjected to such pressures, the present society is hardly in danger of disintegrating.

The denominations and colleges can present a valid claim to their society. The challenge before them is to determine how they will pose the public policy issues which must be addressed. The final sections of this paper consider the question: What is required of the denominations and the colleges if church-related colleges are to continue to spawn the diversity which is essential in our society?

The Denominations and a New Ecumenism

The denominations are challenged to form a new ecumenical bond. The plight of the church-related colleges offers a unique opportunity for cooperation, for the denominations can find in this issue a common cause – the defense of their diversity.

Previous ecumenical efforts have been of two kinds. First, structural ecumenism has addressed theological, ecclesiological, and administrative questions of church order. The goal has been a common ministry, agreement on the sacraments, and a common structure of administration. The most familiar effort of this sort is the Consultation of Church Unity (COCU). Second, coalitional ecumenism has sought denominational allies who share common social agendums. Societal reforms aimed at correcting racism, sexism, and poverty have been the focus of coalitional ecumenism.

An ecumenical thrust addressing the concerns of the church-related colleges would be distinctive. It would require no structural compromises, no doctrinal resolutions, no specific agendas of social reform. The ecumenism that could emerge from our exploration of public policy issues affecting the church-related colleges requires *only that we* *define our diversities and defend them*. All efforts to reduce those diversities would be counter-productive, for that diversity itself must be preserved.

As a consequence, a new fabric of ecumenism addressing the concerns of the church-related college would be minimal in structure and specific in function. Three matters that should be addressed ecumenically suggest themselves: (1) the drafting of a common position paper which would define the societal benefits from the system of church-related colleges, (2) the design and implementation of an educational program addressed to members of the denominations (for the sole purpose of interpreting the position paper described in the first point), and (3) the development of a public policy strategy whose purpose would be to enlist concerted action among the members of the denominations to alter public policy.

Let us examine these steps.

1. Position Paper

If the basic argument of this paper is acceptable, an outline for a position paper is already in hand. Further examination of the assertions made, a careful documentation of key points, and a detailing of the consequences would be required. The resulting paper could be shared among the denominations represented in the National Congress. If such a document received wide approval, a policy basis for steps 2 and 3 would be in place.

2. Educational Program

The second step is far more challenging. The average church member has little knowledge of the church-related colleges and probably suffers from significant misinformation. Church members may be aware that, at an earlier period, the church established colleges to provide higher education when no one else was doing the job. Many members reason that secular education is now well developed, and that church-related colleges are no longer needed. Worse still, church members, when seeking higher education for their own children, have discovered the damaging tuition differential between the church-related colleges and public universities. Out of economic necessity many members have turned to public institutions for their children's education. Finally, a few church members complain that since the church-related colleges serve only the privileged few, they have no legitimate claim upon church sponsorship. The educational task is vast.

Undertaking this task ecumenically would dramatize the urgency of the concern. A systematic program aimed at educating church members would require a common perspective, shared publications, and the development of interdenominational grass roots meetings. The presence of a Roman Catholic Bishop and a Seventh-day Adventist Superintendent on the same platform, pleading for the same public policy initiatives, might prove effective.

3. Public Policy Strategy

Other papers suggest specific current concerns regarding public policy. A careful study of those issues will reveal how uninformed and unprepared the denominations are. If any denomination has acted in the public policy arena, it was done independently and defensively. We have moved from weakness. Some denominations, on their own, have ventured forth on certain issues of public policy and then withdrawn, discouraged by the futility of their efforts. Most have remained silent.

The denominations represented in the National Congress, if they were to act in concert, could be heard. If there were common agreement on public policy alternatives and those alternatives were effectively communicated to the constituencies of the denominations, the effect would be dramatic and immediate. Vast public support for the system of church-related colleges would result. Legislators and governmental administrators can count.

The plight of the church-related colleges offers to the denominations a rare opportunity. With a minimum of organization, a concerted effort could be launched which would alter public policy in higher education. Best of all, the effort would involve no special pleading. The denominations would be seeking recognition of a contribution of the church-related colleges to society which has been and will continue to be vital to the general welfare.

The Colleges and a New Federalism

The colleges represented in the National Congress are also challenged to concerted action. The model for cooperation is found in the American heritage: federalism. Federalism requires broad agreement at the national level but allows for a vast diversity of styles and initiatives locally.

Thus far, the church-related colleges have associated with one another within the broader context of private higher education. The National Congress represents the first disciplined effort to identify and reflect upon the specific interest of church-related colleges. Unfortunately, such fleeting contact among the colleges is unlikely to create the discipline required to change public policy. A more specific covenant of common purpose is needed.

First, a federalism among the colleges would entail a minimum of organization. Relatively few issues require state and national action. The single overriding concern would be to organize for the sake of defending the diversity of the system of church-related colleges. The colleges are bound together by their common apprehension about the emerging demands for conformity and uniformity.

Second, federalism among the colleges would require a covenant of mutual support and discipline. The Christian faith holds that its believers should "love neighbor as self." A corollary of the belief is that all will be accorded dignity and equity, regardless of race, sex, or economic status. Efforts to assure access to higher education for all who seek it are essential. Historically, the church-related colleges have been in the vanguard in providing educational opportunities to the poor and to minorities. To sustain this ministry to the disadvantaged will require new strategies, new financial resources, and the sharing of those policies and programs which have proved effective. Mutual support and mutual discipline are also required regarding equal employment opportunity and affirmative action. If the church-related colleges are to be faithful to their heritage, they must go beyond begrudging compliance with legal requirements. Self-regulation is a moral necessity and wise strategy as well. Each church-related college has a vital stake in the compliance of all others. Serious violations of equal employment opportunity and affirmative action regulations on the part of any church-related college would invite industry-wide regulation. Uncomfortable though the prospect may be, a system of mutual discipline is the only viable option beside governmental imposition.

Third, federalism requires of all colleges that they be initiators, not mere reactors. As societal patterns shift, new opportunities present themselves. Church-related colleges can maintain their diversity only as they generate new educational options and define emerging issues from their perspective. In the absence of compelling local options, wooden and stultifying solutions will be devised by government. Such decisions will diminish diversity, and the most valuable gift which the system of church-related colleges can offer its society will be lost.

Finally, an informal bond among the church-related colleges would indirectly strengthen ties between the college and the church. At present, those ties are tenuous in many cases. Some colleges fear too close a tie with their denominational communities. Such a tie might complicate their effort to develop financial support. Colleges receive support from donors of various denominations as well as from donors without denominational loyalty. Some colleges fear that a restrictive tie with the denomination might undermine academic credibility. A confederation of church-related colleges would provide support for colleges with these apprehensions. Further, such a confederation would be a counterpart to the ecumenical efforts described in the previous section of this paper. The denominations and the colleges would have the capacity to focus on common public policy issues and act in concert.

Conclusion

The denominations and the colleges must assert their claim upon American public policy so as to assure the continued health of the system of church-related education. Such actions are not special pleading, nor the assertion of petty privilege. Rather, the system of church-related colleges has a legitimate claim upon the broader society. That system has created a diversity which is essential for the healthy function of the American society. Our American polity is grounded in the assumption that justice can be approximated only through the interaction of diverse interests and commitments. The church-related colleges have done much to assure that justice will thrive within our common life.

We need not approach the broader society timidly and apologetically, as though we begged an indulgence. Rather, we can affirm the vital role of the system of church-related colleges in the general welfare and assert our right to a public policy which will assure the continued health of that system.

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Addendum

(The following addendum expands on a concept briefly mentioned in the above paper. It describes a construct of place and relationship suggested as a model within which to talk about the relationships between church-related colleges and other institutions of society, including the federal government.)

Thoughtful people across the country are asking with increased urgency what should be the model or standard by which to assess the relationship between the federal government and other major institutions of society. We have developed numerous methods to organize and discuss the relationships among individuals and between individuals and the government. The major economic, social, and political philosophy of the nation's heritage speaks to these relationships, for the rights of individuals have been considered the major cornerstone of our development as a nation. Indeed, a Bill of Rights defining the relationship between individuals and the federal government was considered a necessary addition to the Constitution.

Yet although the individual's relationship to the nation is generally clear, the nation is often viewed as being composed, not so much of individuals, but of the institutions that are formed by those individuals. The role of institutions has grown more important in sheer weight of numbers and power, and we have not defined as yet any adequate way of describing what should be the relationships among institutions and between them and the federal government. The natural evolutionary balance between the government and other institutions has shifted as power has tended to concentrate at the federal level. The situation demands an adequate way to talk about these institutions, to delineate their rights and to recognize their obligations.

Two needs are paramount in defining these relationships among institutions. The first is to assess the institutions' positions – their commitments and their functions in society. This is the matter of place. The second construct must be one which describes the relationship among them which embodies the ideal against which any actual relationship can be measured.

Church-related colleges and universities are raising these institutional relationship questions more frequently. Their most basic questions seek to clarify the relationships they have with one another, their individual and collective relationships with the federal and state governments, with their church denominations, and with other social institutions. The dual construct of place and relationship can be applied to the questions raised by these church-related colleges and universities.

In terms of place, as a part of the larger family of independent colleges and universities, church-related colleges stand for educational and religious values and diversity. They have learned to discuss the relationship with each other starting with points of agreement rather than disagreement. The most basic consensus, of course, is their Christian commitment. It is from this positive ecumenism, one which stresses commonalities but acknowledges differences, that they now seek to establish an appropriate means of discussing their additional relationships.

In discussing these questions, we need to assert some balancing principle in terms of mutual initiatives and constraints and to admit some diversity and tension in that balancing process. A relationship model is suggested by the federal model. This implies a broad commonality of position, some concentration of power at the federal level and wide diversity of position and some decentralization of power at the local level. It implies, further, that there are initiatives and constraints on both the federal government and local institutions and that these need to be balanced. Thus, for example, when power is so concentrated at the federal level that it destroys the balance between the federal government and either the state governments or other institutions at a more local level, then there exists a context in which to talk about too much government.

The federal principle implies that there will be a balance and that, in effecting that balance, it is necessary to talk about constraints on the federal government, such as have been proposed by NAICU, but also to talk about the initiatives to be exercised by local institutions as a means of balancing federal power. Thus, in the area of the funding of student aid, the best means of ensuring that that funding is not totally federalized is to assume a larger responsibility for that funding at the local level by church-related colleges and their denominations and the states. The principle also applies in the area of federal government and to propose self-regulation initiatives to be exercised by the local institutions. Issues of financing, of public policy, of social action and even of problems that may ultimately be subject to litigation can be discussed in terms of this federal construct. It implies that both the church-related colleges and other institutions, either governmental or nongovernmental, can be active or reactive at various stages of their relationship. Yet in that action and reaction a balance must be maintained. When the balance begins to shift or is destroyed, the federal model provides for the raising of warning flags and the necessity of a self-conscious examination of the relationship to determine the sources of stress and the means of alleviating them.

The federal model is also useful in understanding the relationship that exists between church-related colleges and their denominations. It accepts the principle that there will be wide diversity at the local level among different kinds of church-related institutions but that together the colleges will provide a critical mass necessary to effect a balance with federal power. Finally, the construct may also be useful in suggesting that there may be a given point of view about higher education officially expressed at the denominational executive level, but there can also be a wide diversity of institutional expressions of that point of view among the church-related colleges of that denomination.

Unity in and commitment to principle, diversity in profession and practice – such are the characteristics of the nation's church-related colleges and universities and the new relationship that they have forged among one another. This new ecumenism of place, when grafted to the federal model of the relationship between institutions, may thus provide a new and useful construct, a new balance, to be used and proclaimed by church-related colleges and universities.

SECTION III

Financial Issues

Chapter 10

FINANCIAL CONDITIONS AND TRENDS OF CHURCH-RELATED COLLEGES

John Minter

The economic and financial domain of church-related higher education is tied to approximately 900 seminaries, colleges, and universities. (Churches sponsoring the National Congress are related to 600 colleges and universities.) These 900 colleges enroll 1.2 million (52%) of students in private higher education and hold $15.35 billion (40%) of the total book value of land, buildings, equipment, and endowment. (See Table 1)

TABLE 1

Church-Related College Assets 1979

		Per Cent
Total Assets*	$15,336,000,000 (est)	100
Land	731,000,000	5
Buildings	9,005,000,000	59
Equipment	1,828,000,000	12
Endowment	3,772,000,000	24

*Based on reported book value of assets in 1977 increased at an annual average rate of 5.5%.

Colleges and universities related to churches supporting the National Congress hold 82% of church-related colleges assets. The value of their total assets has been increasing at a rate of 5.5% per year.

Total Current (Operating) Funds

The total amount of operating funds made available to church-related colleges (CRC) annually will be about $6.8 billion in fiscal 1979, and for each $100 of tangible assets invested in these colleges, their activities are generating $44 in annual current fund revenues.

Sources of Funds

Most funds for church-related colleges come from the students, their families, and government agencies offering student financial assistance. The major categories of sources for church-related colleges and their contribution to total revenues are shown in Table 2.

TABLE 2

Sources of Annual Current Fund Revenues

	Church-Related Colleges & Universities		Independent Colleges & Universities
	Dollars* (in millions)	Percent Distribution	Percent Distribution
Total Sources	6,859	100	100
Tuition & Fees	2,930	43	32
Government Contracts & Grants	752	11	22
Private Gifts	782	11	9
Endowment	[illegible]	4	6
Special Services	82	1	2
Auxiliary Services**	1,115	16	10
Hospital Services	494	7	9
All Other Sources	496	7	10

*Estimated revenues for 1979 are based on 1977 reported revenues factored at a different three-year average annual rate of increase for each category. The changes rates are from the Minter/Bowen annual report on Educational and Financial Trends in Independent Higher Education.

**Includes primarily dormitory and food services.

Student Tution and Fees

By far the single most important source of funds for almost every college is tuition. The dollars received for dormitory and food services and tuition together account for 59% of total revenues flowing to church-related-colleges. Nationally, the figure for non-church-related-colleges and universities is substantially lower at 42%. During the fiscal year 1979, the average CRC will receive about $3,220,000 in tuition income.

Because church-related colleges are highly dependent on tuition revenues, they are particularly vulnerable to the decline in numbers of the age group 18 to 21 year olds and to economic conditions that affect the student's choice of college.

Student Financial Aid

Independent colleges and universities extablished the policy of aiding deserving students who could not otherwise pay for a college education. Today, in the typical liberal arts college, the total student aid budget amounts to about 30% of the educational and general (E & G) budget. (E&G Budgets do not include auxiliary enterprises or independent operations.)[1] For the typical college, this equals $1.133 million per year. This amount includes grants-in-aid, work-study appropriations, and funds available to the student through various loan programs, such as the National Direct Student Loan (NDSL) and Federally Insured Student Loan/Guaranteed Student Loan (FISL/GSL) programs.

The make-up of the sources of these student aid funds is important as we think about financing strategies. The typical liberal arts college in fiscal year (FY) 1977 received 35% of its student aid funds from sources controlled by or directly related to the institution. Income from endowments restricted to student aid, grants from general funds, campus payroll, college work-study matching funds, and institutional loans are included in these sources.

Equal to and slightly ahead of the institutional sources are federal sources of student aid. The liberal arts colleges in FY 1979 received 36% of student aid funds through federal grant, work, and loan programs. During the same period, state government sources provided 10% of student aid funds at the typical liberal arts college.

From these figures it is clear that independent colleges rely heavily on state and federal government student aid funds.

In addition, the percentage increases in student aid funds at the typical college in 1976 to 1977 show federal funds increasing 20%; state funds increasing 10%; all institutional funds up only 8%.

Tables 2a and 2b show the contribution of various aid programs to the total assistance budget. Table 2b reports the rate of change in these same programs for FY 1976 to FY 1977, the latest data available.[2]

State and federal aid programs are at significant and increasing levels of support for aid packages for students in church-related colleges. The trend probably will accelerate with the new Middle Income Student Assistance Act (MISA).

Government Contracts and Grants

Church-related colleges and universities receive substantially fewer revenues from federal, state, and local government than their non-church-related counterparts. Table 2 shows 11% of total revenues coming from government contracts and grant sources compared to 22% for the non-church colleges. The average CRC will receive in the neighborhood of $828,000 in government contracts and grants in FY 1979.

However, included in the tuition income of all independent colleges are student aid revenues awarded to students on terms stipulated by the government. In FY 1977, such funds were 7% to 8% of Educational and General Revenues.[3] As more state and federal student assistance programs are extended to the independent college sector, dependence on tax revenue sources will increase.

TABLE 2a

Percentage Distribution of Student Aid Dollars by Programs, Median Institutions, 1975-76 and 1976-77[1]

	Research and Doctoral-Granting Universities		Comprehensive Universities and Colleges		Liberal Arts Colleges I		Liberal Arts Colleges II		Two-Year Colleges		Five Types of Institutions Combined	
	1975 -76	1976 -77	1975 -76	1976 -77	1975 -76	1976 -77	1975 -76	1976 -77	1975 -76	1976 -77	1975 -76	1976 -77
Institutional Sources:												
1. Endowment, gifts	13.2%	15.9%	5.2%	5.7%	23.9%	25.0%	7.3%	8.5%	10.2%	10.4%	11.5%	10.7%
2. Unrestricted general funds	14.9	13.9	21.3	19.7	24.9	20.4	11.2	10.8	4.7	7.7	18.9	16.6
3. Student payroll	9.9	9.7	6.2	6.0	6.8	9.2	4.4	3.7	5.5	5.2	6.4	6.1
4. Institution loans	1.2	.5	1.3	1.4	1.2	1.1	.7	.2	1.9	1.8	1.2	1.1
5. FISL/GSL from institution funds	2.2	2.9	5.5	12.5	6.3	7.8	8.3	3.9	—	—	3.6	5.1
All institutional sources[2]	52.4	52.9	40.3	40.4	53.2	51.7	25.9	21.6	25.3	27.3	40.1	37.6
State Sources:												
6. Local state	6.6	7.4	18.0	17.4	7.8	8.9	16.7	13.3	12.0	9.4	12.8	11.6
7. Other states	.5	.9	.5	.4	.8	.7	.3	.3	.3	—	.5	.5
All state sources	5.9	7.2	16.9	17.9	5.9	8.5	13.8	11.9	12.1	9.9	12.2	11.2
Federal Sources:												
8. BEOG	4.4	6.3	9.4	13.5	5.4	8.0	14.0	19.0	28.8	30.9	9.4	13.4
9. SEOG	2.2	2.4	5.0	4.0	3.2	3.7	7.7	6.9	5.3	4.7	4.4	4.2
10. LEEP	1.2	.8	1.7	1.2	—	—	—	—	—	—	1.6	1.1
11. College work-study[3]	4.6	5.3	5.7	5.8	5.8	4.8	9.5	9.3	9.5	9.2	6.8	6.9
12. NDSL[4]	14.6	14.2	13.3	11.8	11.7	10.0	11.1	8.9	10.7	8.6	12.6	11.3
All federal sources[5]	26.4	35.6	33.7	36.6	23.6	24.2	44.8	44.9	56.7	56.3	33.7	37.1
All Other Funded Grants	1.5	1.1	2.4	2.3	6.0	7.2	1.4	.9	.9	.9	2.4	2.2

[1] All funds: grants, loans, and work from all sources known to the institutions.

[2] Includes lines 1, 2, 3, 4, 5, 20 percent of line 11, and 11 percent of line 12.

[3] Includes 20 percent institutional share.

[4] Includes 11 percent institutional matching funds.

[5] Includes lines 8, 9, 10, 80 percent of line 11, and 89 percent of line 12.

TABLE 2b

Selected Aspects of Student Financial Aid by Programs, Median Institutions, All Types of Institutions, 1975-76 and 1976-77

	% Change in Total Dollars 1975-6/1976-7	% of E&G Expenditures 1976-77	Recipients as % of Head Count 1976-77	% Change in Recipients 1975-6/1976/7	Average Award per Recipient 1976-77	% Change in Average Award 1975-6/1976-7	Avg. Award as % of Avg. Student Budget 1976-77
Total Financial Assistance[1]	13%	25%	49%	3%	$1,894	6%	42%
Institutional Sources:							
1. Endowment, gifts	9	3	13	6	[illegible]	4	17
2. Unrestricted general funds	5	4	16	3	940	18	20
3. Student payroll	8	2	12	6	448	5	10
4. Institution loans	0	*	1	0	689	*	14
5. FISL/GSL from institution funds	20	1	5	8	[illegible],262	1	25
All institutional sources[3]	8	10	75[4]	4	419	5	10
State Sources:							
6. Local state	9	3	12	6	875	*	17
7. Other states	9	*	1	11	600	-3	12
All state sources	10	3	12	6	795	*	16
Federal Sources:							
8. BEOG	51	3	11	53	895	*	18
9. SEOG	2	1	6	5	607	-1	14
10. LEEP	-3	*	1	-1	724	-3	13
11. College work study[5]	9	1	11	3	493	5	11
12. NDSL[6]	4	3	13	3	735	2	16
All federal sources[7]	20	9	46[4]	15	674	4	14
All other grants	1	*	3	4	929	3	18

[1] All funds: grants, loans, and work from all sources known to the institutions.

[2] Unduplicated recipients.

Private Gifts and Grants Revenue

Church-related colleges receive a substantial amount of revenue from annual giving (11%). Among smaller liberal arts colleges, gifts as a percent of total revenues range from 2% to 28%.[4] Among the larger, more prestigious colleges, the range is 4% to 43%. The average church-related college will receive around $860,000 in gifts in 1979. Whether or not a high ration of gifts is a sign of financial weakness depends on the number of giving units and the historical relations between the college and its donors. In general, an institution with a high level of dependence on one or only a few sources of revenue is in a vulnerable financial position.

Income from Endowment

A myth persists that independent colleges and universities are well endowed. A few institutions are very well endowed. Three quarters of all independent colleges, however, receive 4% to 6% or less of their revenues from endowment earnings. Endowments in church-related colleges will earn about $258 million dollars in 1979. The average church-related college with investment portfolios can expect revenues of around $250,000.

Miscellaneous Sources of Funds

Rounding out the revenue sources, we include the sale of services by educational departments ($82 million), hospital services ($494 million), and all other sources not classified above ($446 million). Together, these sources contribute 15% of total revenues to the enterprise. The average college can expect about $90,000 departmental sales and $490,000 in other sources. Obviously, most colleges and universities do not sell hospital services. This figure has meaning here only for the total.

Total Revenues

Current revenues from all sources in FY 1979 will amount to some figure close to $6.9 billion. The average total revenues for a church-related college will be near $7.6 million. The typical or median college total revenue will be nearer $3 million. Total revenues of church-related colleges represent 39% of current operating funds flowing to all private higher education.

Major Sources of Current (Operating) Fund Expenditures

Total current fund expenditures by CRC in FY 1979 will total about $6.7 billion, $140 million short of estimated total revenues. The net surplus amounts to 2% of total revenues, (the national average projected from 1977).

Over the years our studies have shown little, if any, shifts in the distribution of funds among types of expenditures. Once a staff and program is established, an organizational momentum seems to keep the distribution of expenditures relatively stable. Large increases in energy costs are, however, reshaping plant operations budgets. If current energy price increases persist, we may expect a higher percentage point increase in the plant use of revenues than is shown here. Table 3 shows the uses of operating funds.

TABLE 3

Uses of Annual Current Fund Revenues

	Church-Related Colleges and Universities		Independent Colleges and Universities
	Dollars (In millions)	Percent Distribution	Percent Distribution
Total Uses*	6,719	100	100
Instruction	1,505	28	26
Research	245	4	12
Public Service	54	1	2
Academic Support	350	5	6
Student Services	337	5	3
Administrative Support	742	11	9
Plant Operations	556	8	7
Scholarships (General Fund)	267	4	3
Scholarships (Student Aid Fund)	249	4	3
Auxiliary Services**	1,208	18	11
Hospitals	507	8	10
All Other Uses	305	4	8

*Estimated expenditures for 1979 are based on 1977 reported expenditures factored at a separate three-year average annual rate of increase for each category. The change rates are from the Minter/Bowen annual report on Educational and Financial Trends in Independent Higher Education.

**Includes primarily dormitory and food services.

Instruction

Instruction is the primary mission of most church-related colleges. Thus, salaries for instructors are the largest single use of current fund revenues. The average church-related college will spend around $2 million a year for faculty salaries. Faculty compensation has increaaed at a rate of 6.4% or 6.5% per year, close to the annual increases in the Consumers Price Index. Future compensation increases can be expected to continue to follow consumer economic trends. The rate of change in aggregate compensation will probably lag, however, as the total size of the teaching staff in CRC begins to shrink with decreased enrollments.

Research

This category includes all funds used for activities specifically organized to produce research outcomes. Because instruction is the primary mission of church-related colleges, these amounts are not large, only 4% of aggregate expenditures. The average college will spend only $269,000 in this area in FY 1979.

Public Service

Uses of funds in this category are for activities established primarily to provide noninstructional services benefiting individuals and groups external to the institution. Examples of such services are conferences, institutes, general advisory services, reference bureaus, radio and television, consulting, and similar noninstructional services to the community. The average college will spend only $60,000 annually for activities of this kind.

Academic Support

Funds in this category are used to provide support services for the college's primary missions of instruction and research. Services assisting academic functions, museums, libraries, galleries, audio-visual, and general academic administration are included. Five percent of total resources are used for these activities. In 1979, the average college will spend close to $385,000 for these purposes.

Student Services

The primary purpose of funds used in this category is to contribute to the student's emotional and physical well-being and to the student's intellectual, cultural, and social development outside the context of the formal college instruction program. Typical services include admissions, student aid administrations, cultural events, student newspaper, intramural athletics, student organizations, remedial instruction, and student health services. About $370,000 or 5% of the annual college budget will be spent for these purposes. Seventy-five percent of independent colleges and universities will spend 3% or less of their funds for student services.

Administrative Support

Central executive-level activities, fiscal operations, personnel, logistical activities, faculty and staff support services, and activities concerned with community and alumni relations, including development and fundraising, are the uses of funds in this area. Eleven percent of the average budget will be allocated for these activities. Nationally the proportion ranges from 3% to 30% with three quarters of the institutions spending 16% or less of their funds for administration. The average college will spend $816,000 in FY 1979 for administrative support. The percentage for CRC is larger primarily because of smaller overall budgets in relation to fixed costs.

Plant Operations

Funds in this category are used for the operations established to provide services and maintenance related to grounds and facilities. Also included are utilities, fire protection, insurance and similar items. Not included here are expenditures made from plant funds, a separate group of funds established for renewal, construction, and financing related to land and buildings.

Eight percent of the budget ($611,000) will be used for these purposes by the average CRC college in FY 1979.

Scholarships

Church-related colleges are spending 8% of their total funds for outright grants to students selected by the institution to receive those grants. These funds are not used to pay students for work performed for the institution. They do not include funds for recipients of aid which the college is not allowed to select.

The average college will use $568,000 for scholarships in FY 1979. Slightly more than half that amount, $294,000 (52%) will be spent out of general funds and $274,000 (48%) will be paid from funds received specifically for student aid.

Auxiliary Services

The uses of funds in this category are for residence halls, food services, intercollegiate athletics, college stores, faculty clubs, and all similar activities when they are managed as essentially self-supporting activities.

Residence halls and food services are the primary auxiliary activities of must church-related colleges. Next to instruction, the large proportion of funds (18%) is used for these purposes. The average church-related college will spend $1,329,000 for auxiliary services in FY 1979.

Measures of Financial Condition

The patterns of sources and uses of funds available to church-related colleges are important as we think about strategies for increasing financial support for the higher education mission of the church. We also need to know the financial condition of church-related colleges to determine the level of effort to keep them financially viable.

Net Revenue

Our first question about the financial condition of a college should be, "Is the current operation in balance? Is the flow of funds into the institution this year adequate to cover this year's expenses? The measure of this relationship is the Net Revenue Ratio (the difference between revenues and expenditures divided by revenues). In FY 1979, the average ratio for liberal arts colleges was 3% (Table 4) with a range of -9% to 23%.[5] Preliminary analysis of audits show the typical Net Revenue Ratio will be nearer 2% for FY 1978, and a national telephone sample survey of 100 independent colleges in December of 1978 suggests that the downward trend in net revenues will continue.

TABLE 4

Trends in Key Financial Ratios* All 4-year Liberal Arts Colleges

	Percent			
	1974	1975	1976	1977
1. Total Net Liabilities as % of Total Net Assets	20	19	19	19
2. Current Liabilities as % of Current Assets	97	95	86	[illegible]
3. Unrestricted Funds Balances as % of E & G Expenditures	43	39	36	33
4. Net Revenue Ratio	1	1	3	3

	Percent (cont.) 1974	1975	1976	1977
5. Tuition & Fee Contribution to E & G Expenditures	62	61	64	64
6. Federal Contribution to E & G Expenditures	10	9	11	11
7. Gift Contribution to E & G Expenditures	17	16	17	17
8. Endowment Contribution to E & G Expenditures	7	7	6	6

*Weighted Average Ratio — Minter/Bowen National Sample

Colleges may be operating the short run in the black, but what about the long run? The steady downward trend in the Working Capital Ratio (Table 4, Line 3) suggests that cash reserve levels are not being maintained in the current high inflation environment. The smaller liberal arts college (Table 5, Line 3b) is in a particularly vulnerable position in this regard. Add to this problem the constant temptation, if not practice, to defer maintenance of buildings and grounds because current funds are demanded by higher priority uses. Both of these conditions, if they exist at a college, mean that balancing the budget in the short run only postpones the day of serious financial reckoning.

TABLE 5

Trends in Key Financial Ratios* Liberal Arts I and Liberal Arts II Compared

		Percent 1974	1975	1976	1977
1. Total Net Liabilities as % of Total Net Assets	LA I	11	11	10	10
	LA II	26	25	25	25
2. Current Liabilities as % of Current Assets	LA I	71	51	49	47
	LA II	115	126	112	121
3. Unrestricted Funds Balances as % of E & G Expenditures	LA I	76	73	69	67
	LA II	19	15	13	9
4. Net Revenue Ratio	LA I	3	1	2	4
	LA II	0	1	3	3
5. Tuition & Fee Contribution to E & G Expenditures	LA I	68	66	67	67
	LA II	58	58	61	61
6. Federal Contribution to E&G Expenditures	LA I	4	3	4	3
	LA II	14	14	16	16
7. Gift Contribution to E & G Expenditures	LA I	14	13	15	18
	LA II	19	18	18	17
8. Endowment Contribution E & G Expenditures	LA I	12	12	11	11
	LA II	3	3	3	3

*Average Ratios, Minter/Bowen National Sample

Contribution Ratios

Yet another way of testing the financial condition of a college is to look at the relation between levels of various revenue sources and expenditures. Four of the most important revenue sources are compared in this fasion and shown in Lines 5 through 8 in Tables 4 and 5. These ratios are called Contribution Ratios.

A constant or increasing ratio means that the revenue source is keeping pace with, or exceeding, expenditure increases. (In these cases, we use educational and general expenditures as a base, leaving out auxiliaries, hospitals, and independent operations.) A decreasing ratio usually means that expenditures are increasing at a faster rate or at least are larger in proportion to the revenue source. Expenditure increases result from either added activities (larger operation) or paying more for the same level of work or product (inflation).

Tuition and Fee Contribution Ratios in 1974 and 1975 were static or declining. In FY 1976 and FY 1977 substantial increases in the ratio came as federal BEOG (Basic Education Opportunity Grant) money began to flow to the colleges through tuition grants. Title III money also contributed substantial amounts to institutional budgets. The smaller colleges clearly have benefited most from the infusion of federal dollars.

The Gift Contribution Ratio for all liberal arts colleges shows a static situation. The important story is in Table 5, which exposes an increasing ratio for Liberal Arts I colleges and a steadily decreasing ratio for Liberal Arts II. The absolute amount of dollars has increased in the latter case, but not at a rate of equal to increasing expenditures.

Endowment Revenue Contribution is slipping for Liberal Arts I colleges, the holders of most endowment assets. It is down just a point, but down nonetheless.

Overall, we must conclude that liberal arts colleges, including the church-related, are becoming increasingly tuition dependent. This means that, indirectly, they are becoming more government dependent as tuition grant programs are enlarged and extended to the independent sector. The traditional sources of independent revenues, gifts, and endowment are static or declining in relation to the increasing cost and scope of the independent sector.

SOURCES

[1] Minter/Bowen Study of Financial and Educational Trends in Private Higher Education.
[2] *Ibid.*
[3] Minter/Bowen National Sample of Independent Colleges and Universities.
[4] *Ibid.*
[5] Minter/Bowen Study of Financial and Educational Trends in Private Higher Education.

Chapter 11

PATTERNS OF CHURCH MEMBERSHIP, GIVING, AND SUPPORT OF HIGHER EDUCATION

James M. Unglaube

Introduction

Church-related higher education in the United States had its origins in the birth of the nation. It grew as the nation grew. Churches and church people commit themselves to higher education in many ways: by the operation of institutions, by encouraging their people to attend, by the support of alumni and friends from the church, and by direct financial support through church benevolences. The latter are church funds committed to institutions of higher education at the local, regional, or national level. Generally these funds are unrestricted in nature. In order to measure the financial support by religious denominations of their institutions of higher education, one must look at such giving in the setting of patterns of church membership, general levels, and societal conditions.

Church Membership

The *Yearbook of American and Canadian Churches*, published annually by the National Council of Churches of Christ,[1] provides statistical information on church membership and giving. Church membership will be considered here over the period 1970-1977. Inclusive church membership figures are used since differing patterns of church polity make comparisons at the confirmed level less meaningful.

The thirty-one (31) denominational groups listed in Table 1 showed a net gain in church membership over the period of 1970 to 1977 of just 1.8%. Nineteen (19) of the thirty-one (31) showed increases ranging from 1.1% to 50.2%. Twelve (12) showed declines ranging from 2.7% to 22.4%.

If the nine (9) largest denominational groups (1970) are separated from the sample, only three (3) show increases over the period. A majority of the church-related colleges and universities in the United States are related to these nine church bodies.

It is apparent that church membership has not kept pace with the growth in population in the United States. Since giving is related to church membership, it is certain to suffer from a lack of growth in numbers of members.

Church Giving

The *Yearbook of American and Canadian Churches*[2] also provides detailed information on church finances. Giving will be compared for the same two years as church membership, 1970 and 1977. Total contributions and total benevolences are both presented in Table 2 in total dollars per capita inclusive membership. The difference between total contributions and total benevolences represents those funds which remain in the congregation for local use. The list of denominational groups is the same as that used in Table 1. Caution must be exercised in using these data since information is not available for eight (8) groups including two (2) of the top nine (9) in terms of church membership.

Total contributions over the period increased 67.8% while total benevolences grew by 76.9%, meaning that the local congregations shared a greater portion of their receipts. On a per capita inclusive membership basis, the numbers grew by 71.3% for total contributions and 80.5% for total benevolences.

Thus, church membership held almost constant, and giving increased at a level above the Consumer Price Index and near per capita personal income in the United States. These comparisions are presented graphically in Table 3.

Voluntary Support of Colleges and Universities by Religious Denominations

The Council for Financial Aid to Education (CFAE) prepares an annual report on "Voluntary Support of Education."[3] It includes as one of its categories support from religious denominations. These data are used here in summary fashion (Table 4). They are not broken down by denomination since the reporting device is completed voluntarily and does not include all institutions.

Over the period 1970 to 1977 such support did increase significantly from $68 million (618 institutions) to $103 million (617 institutions), although declines are shown between 1970-71 and 1971-72 and between 1971-72 and 1972-73. In order to present a more accurate picture of such support over the years, the CFAE report also includes a pattern of annual growth for institutions reporting in both the current and past year. This pattern is represented in Table 5 and it is the voluntary support data presented graphically in Table 3.

Such voluntary support has grown, but it has lagged significantly behind total church contributions and societal factors such as the Consumer Price Index and per capita personal income. Its growth has also fallen behind that of the educational and general expenditures of the institutions receiving the support. Most of this lag is due to the decline in support in the early 1970s.

Summary

The dollar support provided for institutions of higher education by religious denominations constitutes a very small portion of college and university operating budgets. Too frequently its importance is minimized for this reason. However, Table 3 indicates that in 1977-78 some 617 institutions received in excess of $103 million from their supporting churches. If these funds had to be replaced by income from endowment, the institutions would need more than $2.1 billion in additional endowment. This is no small sum of resources in relation to existing endowments. The $103 million also says nothing of the loyalty to the institutions of people of the churches in terms of their personal financial support and their willingness to encourage others to attend.

NOTES

[1] *Yearbook of American and Canadian Churches*, edited by C.H. Jacquet, Jr., National Council of Churches of Christ (New York: Abingdon, 1971-1979 editions).

[2] *Ibid.*

[3] "Voluntary Support of Education," published annually by the Council for Financial Aid to Education, New York (1970-71 through 1977-78 editions).

TABLE 1

Inclusive Church Membership For Selected United States Denominations 1970 and 1977

	1970	1977	Change Number	%
American Baptist	1,472,478	1,584,517	+ 112,039	+ 7.6
American Lutheran	2,543,293	2,390,076	- 153,217	- 6.0
Assemblies of God	625,027	939,312	+ 314,285	+50.2
Baptist General Conference	103,955	120,122	+ 16,267	+15.6
Christian & Missionary Alliance	112,519	152,841	+ 40,322	+35.8
Christian Church (Disciples)	1,424,479	1,256,849	- 167,630	-11.7
Church of God (Anderson, IN)	150,198	171,947	+ 21,749	+14.4
Church of God (Cleveland, TN)	272,278	377,765	+ 105,487	+3[illegible].7
Church of Jesus Christ of Latter-day Saints	2,073,146	2,486,261	+ 413,115	+19.9
Church of the Brethren	182,614	177,534	- 5,080	- 2.7
Church of the Nazarene	383,284	455,648	+ 72,364	+18.8
Cumberland Presbyterian Church	92,095	93,200	+ 1,105	+ 1.1
Episcopal Church	3,285,826	2,818,830	- 466,996	-14.2
Evangelical Covenant Church	67,441	74,060	+ 6,619	+ 9.8
Free Methodist Church of N.A.	64,901	69,134	+ 4,233	+ 6.5
Jehovah's Witnesses	388,920	544,018	+ 155,098	+42.4
Lutheran Church in America	3,106,844	2,967,168	- 139,676	- 4.4
Lutheran Church-Missouri Synod	2,788,536	2,681,620	- 106,916	- 3.8
Mennonite Church	88,52[illegible]	96,609	+ 8,087	+ 9.1
North American Baptist Conference	55,080	42,724	- 12,356	-22.4
Presbyterian Church in the U.S.	958,195	869,693	- 88,502	- 9.2
Reformed Church in America	367,606	351,438	- 16,168	-4.3
Reorganized Church of Jesus Christ of Latter-day Saints	152,670	186,414	+ 33,744	+22.1
Roman Catholic Church	48,214,729	49,836,176	+1,621,447	+ 3.3
Salvation Army	326,934	396,238	+ 69,304	+21.1
Seventh-day Adventists	420,419	522,317	+ 101,898	+24.2
Southern Baptist Convention	11,628,032	13,078,239	+1,450,207	+12.4
United Church of Christ	1,960,608	1,785,652	- 174,956	- 8.9
United Methodist Church	10,671,774	9,785,534	- 886,240	- 8.3
United Presbyterian Church in U.S.	3,087,213	2,561,234	- 525,979	-17.0
Wisconsin Evangelical Lutheran Synod	381,321	401,489	+ 20,168	+ 5.2
TOTALS	97,450,937	99,274,759	+1,823,822	+ 1.8

Source: *Yearbook of American and Canadian Churches 1978*, edited by C. H. Jacquet, Jr., National Council of Churches of Christ (Abingdon, New York, 1978)

TABLE 2

Total Contributions and Benevolences for Selected United States Denominations
1970 and 1977[1]

	1970				1977				1970 to 1977 % Increase			
Selected Denominations	Total Contributions	Per Capita	Total Benevolences	Per Capita	Total Contributions	Per Capita	Total Benevolences	Per Capita	Total Cont.	Per Capita	Total Bene.	Per Capita
American Baptist	$132,323,701	$ 89.86	$ 19,656,391	$ 13.34	$200,475,863	$126.52	$27,765,800	$17.52	51.5	40.7	41.2	31.3
American Lutheran	177,018,350	69.60	30,750,030	12.09	288,045,505	119.68	54,085,201	22.63	61.5	71.9	75.8	87.1
Assemblies of God	—	—	—	—	—	—	—	—	—	—	—	—
Baptist General Conference	21,786,756	209.57	3,836,864	36.90	41,167,178	342.43	6,764,787	56.27	88.9	63.3	76.3	52.4
Christian & Missionary Alliance	—	—	—	—	—	—	—	—	—	—	—	—
Christian Church (Disciples)	116,067,724	81.47	17,386,032	12.20	174,572,196	138.90	25,698,856	20.45	50.4	70.4	47.8	67.6
Church of God (Anderson IN)	31,848,260	212.04	4,888,223	32.53	61,970,212	360.40	10,001,062	58.16	94.5	69.9	104.6	78.7
Church of God (Cleveland, TN)	—	—	—	—	—	—	—	—	—	—	—	—
Church of Jesus Christ of Latter-day Saints	—	—	—	—	—	—	—	—	—	—	—	—
Church of the Brethren	19,219,514	108.25	4,891,616	26.78	31,951,720	179.07	8,228,903	46.35	66.2	70.9	68.2	73.0
Church of the Nazarene	85,099,045	222.03	16,638,979	43.41	163,411,261	338.63	21,604,237	47.41	92.0	61.5	29.8	9.2
Cumberland Presbyterian Church[2]	(7,700,754)	(83.53)	(1,079,864)	(11.74)	13,393,227	143.70	1,781,862	19.12	73.9	72.0	65.0	62.8
Episcopal Church	248,702,969	75.69	35,397,311	10.77	401,814,395	142.54	66,514,468	23.59	61.5	88.3	87.9	119.0
Evangelical Covenant Church	16,888,494	250.42	3,578,876	53.87	30,771,724	415.50	7,240,548	97.77	82.2	65.9	102.3	84.2
Free Methodist Church of N.A.	17,626,466	271.59	7,985,264	123.04	32,581,612	471.28	10,163,648	147.01	84.8	73.5	27.2	19.4
Jehovah's Witnesses	—	—	—	—	—	—	—	—	—	—	—	—
Lutheran Church in America	211,914,250	68.21	42,118,870	13.56	313,160,777	105.54	62,076,894	20.92	47.7	54.7	47.3	54.2
Lutheran Church-Missouri Synod	241,162,986	88.48	47,810,664	17.14	358,141,792	133.55	57,077,162	21.28	48.5	54.4	19.3	24.1
Mennonite Church[2]	(14,321,989)	(164.62)	(6,537,240)	(75.12)	31,520,739	326.27	12,980,502	134.36	120.0	98.1	98.5	78.8
N.A. Baptist Conference	8,955,217	162.59	2,368,288	43.00	13,886,760	325.03	3,554,204	83.19	55.0	99.9	50.0	93.4
Presbyterian Church in the U.S.	138,621,221	144.67	30,405,477	31.73	229,562,986	263.96	44,545,349	51.22	65.6	82.4	46.5	61.4
Reformed Church in America	39,414,784	103.86	9,560,311	25.19	68,535,852	195.02	14,262,160	40.58	73.8	87.7	49.1	61.0
Reorganized Church of Jesus Christ of Latter-day Saints	—	—	—	—	—	—	—	—	—	—	—	—
Roman Catholic Church	—	—	—	—	—	—	—	—	—	—	—	—
Salvation Army	—	—	—	—	—	—	—	—	—	—	—	—
Seventh-day Adventists	154,849,300	368.32	109,569,241	260.62	314,671,340	602.45	216,202,975	413.93	103.2	63.5	97.3	58.8
Southern Baptist Convention	891,991,382	76.71	138,480,329	11.91	1,796,057,632	137.33	289,179,711	22.11	101.3	79.0	108.8	85.6
United Church of Christ	182,183,056	92.92	26,934,289	13.74	255,400,993	143.03	35,522,221	19.89	40.1	53.9	31.8	44.7
United Methodist Church[3]	819,945,000	78.02	137,045,000	13.04	(1,244,225,000)	(127.15)	(285,049,000)	(29.12)	51.7	62.9	107.9	123.3
United Presbyterian Church in U.S.	357,091,885	115.63	63,922,375	20.57	533,877,278	208.44	85,706,999	33.46	49.5	80.2	34.9	62.6
Wisconsin Evangelical Lutheran Church	29,393,157	77.08	6,810,612	17.86	56,132,093	139.81	11,639,834	28.99	90.9	81.3	70.9	62.3
TOTALS	3,964,116,220	87.53	787,249,168	16.94	6,653,338,135	149.99	1,397,646,483	30.60	67.8	71.3	76.9	80.6

Source: *Yearbook of American and Canadian Churches*, edited by C. H. Jacquet, Jr., National Council of Churches of Christ (New York, Abingdon, 1971, 1972, 1973, and 1978).

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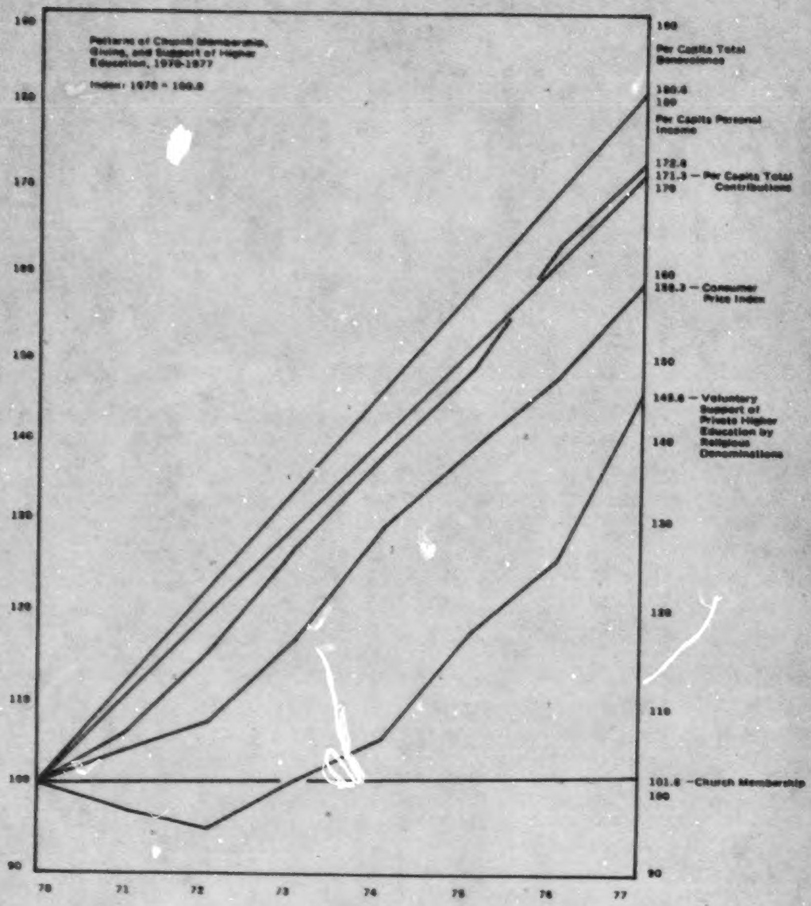
[1] Giving figures in certain years may be affected by special campaigns; difference between total contributions and total benevolences is funds retained by congregation.

[2] Estimated at mid-point between 1969 and 1971 figures.

[3] Estimated at 7% above 1976 figures.

TABLE 3



Sources: See other Tables
"Projections of Education Statistics to 1984-85,"
U. S. Department of Health, Education and Welfare, 1976
"A Fact Book on Higher Education," American Council on Education, 1977

TABLE 4

Voluntary Support of Private Colleges and Universities Religious Denominations

1970-71 to 1977-78
Dollar Support for all Reporting Institutions

	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77	1977-78
Major Private Universities	9,041,802 (58)	9,533,253 (62)	10,650,733 (65)	12,642,009 (68)	12,349,002 (69)	13,493,886 (71)	13,679,744 (73)	13,723,568 (69)
Private Men's Colleges	2,692,040 (28)	2,157,690 (20)	1,348,416 (14)	1,523,240 (14)	1,692,054 (13)	2,338,740 (16)	2,186,371 (11)	1,161,230 (9)
Private Women's Colleges	3,717,781 (94)	2,653,701 (89)	3,026,224 (85)	3,051,976 (78)	3,825,056 (80)	4,546,680 (81)	4,198,135 (69)	4,494,788 (80)
Private Coeducational Colleges	52,935,379 (438)	52,273,745 (469)	46,820,201 (433)	59,437,194 (463)	56,207,807 (453)	63,859,063 (448)	71,663,747 (476)	84,497,586 (459)
TOTALS	68,387,002 (618)	66,618,389 (640)	61,845,574 (597)	76,654,419 (623)	74,073,939 (615)	84,238,369 (616)	91,727,997 (629)	103,877,172 (617)

NOTES: Numbers in parentheses are numbers of institutions in sample. Junior colleges are not included because data source did not separate public and private institutions.

Source: "Voluntary Support of Education," prepared by the Council for Financial Aid to Education, New York (1970-71 through 1977-78 editions).

TABLE 5

Voluntary Support of Private Colleges and Universities by Religious Denominations

1969-70 to 1977-78
Annual Percentage Change

	Number of Institutions*	%Change
1969-70 to 1970-71	547	- 0.3
1970-71 to 1971-72	557	- 2.9
1971-72 to 1972-73	542	- 2.3
1972-73 to 1973-74	544	+ 6.5
1973-74 to 1974-75	546	+ 5.4
1974-75 to 1975-76	546	+ 11.1
1975-76 to 1976-77	551	+ 7.0
1976-77 to 1977-78	541	+ 14.9

*This table shows year-to-year percentage changes for institutions reporting in both years.

Note: Junior colleges are not included because data source did not separate public and private institutions.

Source: "Voluntary Support of Education," prepared by the Council for Financial Aid to Education, New York (1970-71 thru 1976-77 editions).

Chapter 12

CONVERSATIONS ABOUT COLLEGE MANAGEMENT IN THE YEAR 2000

Ivan E. Frick

The 1980 Homecoming at the College of Anywhere was held on a crisp, cool, beautiful autumn weekend. The meeting of the Board of Trustees had just ended and President Cal Q. Lators had invited President Emeritus Green I. Shade for coffee and conversation with two of the college's chief administrators.

President Emeritus Shade had returned this weekend to the College of Anywhere for his fifty-fifth class reunion and for his first visit to the campus since his retirement ten years ago. Dr. Shade thought to himself, as he walked to the administration building, "These moments of conversation will enable me to swing back into the life of the College and then the feeling of separation since 1970 won't seem so great."

In the lovely lounge adjacent to the spacious board room he met President Lators; the Business Manager, Ms. Minnie Komputer; and the Dean of the College, Dr. Mike Row Fische.

"Well," asked President Emeritus Shade, "how are things at the College of Anywhere this year? I still vividly remember the 1960s, days of expansion, adding more students, constructing new buildings, but those were troublesome days, days of violence and protest with the Vietnam War and the Kent State and Jackson State shootings! Things were really lively and turbulent then. Tell me, how are things now? Quiet, I assume!"

"You're right, President Shade," replied President Lators. "Things seem to be quiet now, but the lack of noise is a bit misleading. True, there are no student protests now as there were then, but appearance can be deceiving. I feel that the 1970s have taken their toll on enrollments and faculty morale. And the period from 1980 to 2000 may bring even greater problems than we have had to date."

"The President is right," broke in Ms. Komputer, "and it is interesting that you should ask this question, for just an hour ago we gave a full report on the state of the college to the Board."

"Oh, indeed," interjected Dr. Shade quickly, still wanting to get back into the full administrative life of the college, "and what did you say?"

"Well, to begin with," continued Ms. Komputer, "we described some of our financial ratios with charts, graphics, and narrative. These ratios included our contribution ratios, operating ratios, and our asset and liability ratios."

"Your what?" asked Dr. Shade.

"Our selected financial ratios," replied President Lators. "These ratios, expressed in percentages, indicate the financial health of the College of Anywhere. In addition, the ratios enable us to compare our position with that of other colleges, specifically with all other independent colleges. These ratios are some of the management tools we have developed to manage during the next twenty years, until the Year 2000."

"But I don't understand what they mean!" said the troubled President Emeritus.

"Let me try to explain," volunteered Ms. Komputer. "See, here are selected indicators on the Executive Financial Summary which we presented.[1] The indicators do show some strengths. Current external liabilities as a percentage of current liquid assets is low, which means that we have some liquidity. Our total net revenues as a percentage of total revenues is reasonably high – eight percentage points above the average of the national sample. You see, we have operated well within our income. We do not have short-term debt."

At this point the President shifted the conversation to the indicators which showed weak spots as he said with some misgivings, "But we do have our weaknesses, too. Our total earnings from our endowment fund applied to Educational and General Expenditures is one percentage point below the average of all colleges of our type and two percentage points below the average of all colleges in the national sample. Beside these facts, we still need a new fine arts building, which will require new and sizable capital funds, and when it is constructed our operation and maintenance budget will increase sharply, putting tremendous pressure on the entire Educational and General budget."

"But the main problem," joined in Dean Fische, "is with our tuition contribution ratio, that is, with the fact that total tuition and fees as a percent of the Educational and General expenditures is very high – almost 100%. Those of us on the academic side of the house feel that is our real problem. Being tuition dependent is our Achilles' Heel!" Dr. Fische had a special fondness for symbolism from Greek literature.

Dr. Shade's bewilderment only increased, and he blurted out, "But what does it all mean? What is the bottom line?"

"Oh, the bottom line!" responded President Lators. "Our institutional health is mixed – some strengths and some weaknesses. Our ratios show all these signs on a regular basis, and now we have a program in place to try to correct our weaknesses. I guess you can say we have a good system to monitor our institutional health, but our condition is mixed. With the possible problems between 1980 and 2000, I wonder aloud sometimes whether I want to manage the College of Anywhere during those days. Fortunately, our enrollments have been stable."

Quietness fell over the lounge as each took another sip of coffee. President Emeritus Shade tried to revive the conversation, still wanting to relive his days at the college. "But," he asked, "how do you really know what the prospects will be between 1980 and 2000? I have been around long enough to know that college presidents have imagined dire circumstances before which never materialized. Perhaps you are just imagining these things too!"

"I know that academics are subject to hysteria, too," asserted the president. "I know, also, that forecasters in higher education have been doomsayers, but we know enough about the way things are now, and will be, to recognize what some of our problems will be."

"Take the matter of enrollments!" reasoned President Lators. "The cornerstone of the enrollments has been the traditional college age, the age group 18 to 23 years old. The State Board of Higher Education, the American Council on Education, the National Center for Education Statistics, and other groups have a pretty clear notion about the traditional college age population of the United States through 1992. This year, 1980, the 18-year-old population in the United States is 4,206,000. By 1992, it will be 3,174,000 – a 24.5% drop – and if the 18-year-old decline is to be reversed before 2000 A.D., an increase in the birthrate would have to occur.

"So you see," argued the President, "enrollment declines will be a serious management problem for the next twenty years. If enrollments drop, we will have less income from tuition and will have to cut the size of our faculties and retrench our programs."

"Yes," interjected Ms. Komputer, "and we have refined the enrollment problems a little more. We know that in some states, the 18-year-old population will decline more than in other states and that in some states the number of students going out-of-state to college will continue to be greater than the number coming into the state. Here, take a look at the report of the Policy Analysis Service Reports of the American Council.[2] Unfortunately, as you see, the College of Anywhere is located in a state where there will be a decrease in the 18-year-old population, and the state will continue to serve as a net exporter. Nine states, accounting for almost 28% of the total enrollment, will be affected this way."

"I guess you heard that our enrollment this fall is 1000?" inquired Dean Fische. "You might be interested in seeing the profile of the College of Anywhere in the Year 2000 which we created for the Board.[3] We projected two different possible enrollment drops by the Year 2000, a 25% drop as well as an 18.6% drop; a steady student/faculty ratio of 15/1 will be maintained; and an increase of 5% a year in revenues will occur. Some feel a 5% increase in revenues is far too low. We don't know hot to peg expenditures – utilities probably will increase at 10% a year. We certainly are going to have to reduce costs elsewhere to offset such utility increases."

"Well, I see," sighed Dr. Shade, "the potential changes from 1980 to 2000 are overwhelming – sizable increases in tuition, rampant inflation, unimaginable increases in utility cost and underlying everything, declining enrollments. I think the current tuition charge of $3,000 is high, but $8,000 a year is staggering. Maybe I was president at a better time after all!"

President Lators moved in his chair and spoke with considerable feeling, "You were president during an important, lively time, when church-related colleges wrestled with significant social issues. But the days ahead, frightening as they are, also call for commitment to our purposes as a church-related college, dedicated to quality education where value issues are not ignored. While I am troubled by the future, I am not really ready to quit.

"For you see," continued the president with some conviction, "I believe that change alone is not our problem. You were right in your earlier statement. We have lived through change before – sometimes with as much hysteria as we evoke today. If someone in 1958 had asked you to imagine what the College of Anywhere would be like in 1978, could you have imagined the changes? My friend over at the College of Somewhere showed me an overview on his college covering the twenty-year period from 1958 to 1978, and I found it interesting.

"Do you know," asked President Lators with a relaxed smile, "that tuition at the College of Somewhere was $300 in 1958, and in 1978 it was $2,980, an 893% increase; that its total income was $912,111 in 1958 and $8,775,000 in 1978? Here is what he showed me.[4]

"I guess what I am trying to say," summarized President Lators, "is that change in and of itself is not the primary problem. The bottom line of educational management is always to have the courage-to-be, the will to serve, or the determiniation to go on."

"Of course," replied Dr. Shade with a smile, "but how can that courage-to-be translate itself into actions on the campus during these next twenty years?"

"Here is where the mission of the college is so important," noted Dean Fische. "Some colleges will continue to be oriented to the population 18 to 23 years old. They will cling to those purposes and will view attempts at redefining the mission as a Trojan Horse brought into the camp. I'll tell you one thing: If that is a college's mission, then faculty committees are going to have to direct academic programs to those 18 to 23 year olds, devise programs which attach themselves to their motivation and enable that college to be highly successful in recruiting students in that age group.

"The College of Utopia," continued Dean Fische, "is such a college. It is heavily endowed, primarily residential, receives sizable gift support each year, and is highly selective in its admissions. While you are looking at institutional profiles and executive summaries, let me show you the one which my colleagues at the College of Utopia gave me.[5] That college is really in great shape, and many of us look upon it with envy. As you know, church-related colleges are a diverse group, diverse in size, mission, programs, and available financial resources."

"Sure," interjected President Lators with some irritation, for comparative references to the College of Utopia always seemed to get under his skin. "You know," he went on, "some of us feel that the College of Utopia is asleep to the realities of the next decade, and we are convinced that it, too, will have its problems.

"For there are other options," asserted President Lators. "Some colleges will appeal to new clientele – young adults, housewives, senior citizens. These colleges will take programs away from the campus – to church sites in inner cities, to businesses – any place where persons will want to study."

"And what have you decided for the College of Anywhere?" Inquired Dr. Shade.

"We are weighing our options, including looking at the possibility of developing new clientele," said President Lators. "Whatever we do, we must begin to do quickly, deliberately, and consistently. Creating a sense and statement of mission are on the top of our 'to do' list for this year."

"There are other management challenges," said Ms. Komputer. "Each college needs more and varied kinds of student financial aid. We have depended too long on too much unfunded scholarship aid. Unfunded student aid is a problem at best and an albatross at worst. I suppose you can say that the open secret is that student financial aid is increasingly governmental aid, federal and state. Most of us are still concerned about adequate funding of the Middle Income Student Assistance Act. How we manage from 1980 to 2000 will be determined to a great degree by what kind of student financial aid we receive."

"Obviously," pondered Dr. Shade, now in a reflective mood, "you know I spent a lot of time when I was president working for the State Scholarship Program. It made a lot of difference then, and I am sure it does now. But tell me," Dr. Shade went on, "you must have some notion of the kind of college which will have severe problems in the 1980s and the 1990s and conversely what colleges may have a chance of survival with meaning. Do you not?"

"Surely," said President Lators, "one can create a kind of institutional profile of the college which is already in trouble. It is a college which has no clear mission or purposes, no specific clientele, no cash reserve, with short- and long-term debt demanding considerable funds for annual debt service, low salaries, enrollment declines, severe budgetary pressures so that budget-making is a multi-month hassle, underutilized plant and, finally, no will or determination to change any of this. If a college is able to eliminate a significant number of these problems and develop the will to struggle, I think it has a chance to live with meaning until the year 2000. As we said, the College of Anywhere presents a mixed picture – it has both strengths and weaknesses."

"Yes, I agree," said Dr. Shade, "but the College of Anywhere is church-related and you haven't said anything about church support as a key to surviving. What about church support?"

"As you know, Dr. Shade," answered President Lators thoughtfully, "church support never was a significant percentage of the revenues at the College of Anywhere. I doubt if it will be a significant percentage of the revenue during the next two decades. However, I think that church support is key to maintaining a vital, meaningful church relationship. I believe that the College of Anywhere will be more interested in church-relatedness in the days ahead, not because it will necessarily bring more money, but because church-relatedness is important to us for being the kind of college we want to be. The financial support will be appreciated, but its purpose is primarily to symbolize a vital relationship."

Dr. Green I. Shade arose to go and turned to shake hands with President Cal Q. Lators, Ms. Minnie Komputer, and Dean Mike Row Fische. As he shook hands, he said, "Thanks for such penetrating conversation. I really did relive my days as President of the College of Anywhere – days of tension, uncertainty, and challenge. While the next twenty years may be even more uncertain, I wish for you the will, the courage, and the determination to make them interesting and productive years.

See you at the Homecoming Football game, Alumni Dinner Dance, and College Church on Sunday!"

List of Exhibits

[1] Ms. Komputer shows Dr. Shade a copy of an Executive Financial Summary which is attached as Exhibit 1.

[2] Here Dr. Shade saw a copy of "Changes in Enrollment by 1985," by Cathy Henderson, Policy Analysis Service Reports, Volume 3, Number 1, June 1977. On the coffee table was a more recent enrollment forecast by the Board of Higher Eduation. Significant information is attached as Exhibit 2.

[3] Profile of the College of Anywhere 1980-2000 with anticipated changes, based on the 18 year old population decline and on the forecast by the State Board of anticipated full-time equivalent enrollments.

[4] Overview of the College of Somewhere, 1958-1978.

[5] Profile of the College of Utopia.

EXECUTIVE FINANCIAL SUMMARY
THE COLLEGE OF ANYWHERE
SELECTED INDICATORS

Indicators	College of Anywhere				State 1977		National Sample 1977	
	1974	1975	1976	1977	Liberal Arts II	All	Liberal Arts II	All
1. Tuition and Fees as a percent of Educational and General Expenditures	100	96	96	95	68	68	58	63
2. Endowment Income applied to Educational and General Expenditures	1	1	1	1	1	1	2	3
3. Educational and General Revenues as a percent of Educational and General Expenditures	125	121	116	114	104	104	102	102
4. Net Total Revenues as a percent of total Revenues	16	13	10	10	4	3	2	2
5. Current External Liabilities as a percent of current Liquid Assets			20	17	75	60	117	69

INDEX AND ANALYSIS OF STUDENT ENROLLMENT (F.T.E.)

Prior Year F.T.E.	1973	1974	Base Year 1975	1976
The College of Anywhere	98	99	100	111
State — Comparable Group	96	95	100	109
State — All	100	97	100	102
National Sample — Comparable Group	97	97	100	101
National Sample — All	94	96	100	101

IMPACT OF PROJECTED POPULATION SHIFTS AND MIGRATION TRENDS OF STUDENTS ON ENROLLMENT OF TRADITIONAL-AGE FRESHMEN: 1975-85

I. Six states are likely to increase the number of 18-year-olds and to serve as net importers of freshman students; this combined effect should increase enrollment.

Arizona[a]
Colorado[a]
Delaware[a]
Florida[b]
Idaho[c]
Utah[c]

Percent of 1975 Enrollment Within Group I		
Total	Public	Private
7.8%	8.0%	5.6%

II. Trade-offs between changes in the projected number of 18-year-olds and migration patterns are not projected to significantly affect freshman enrollment levels in 32 states and the District of Columbia.

Alabama[a]
Alaska[d]
California[a]
District of Columbia[c]
Georgia[c]
Hawaii[d]
Indiana[c]
Kansas[a]
Louisiana[b]
Maine[c]
Maryland[d]
Massachusetts[c]
Michigan[a]
Mississippi[a]
Missouri[c]
Montana[d]
Nebraska[c]

Nevada[d]
New Hampshire[c]
New Mexico[d]
North Carolina[c]
Oklahoma[a]
Oregon[a]
Rhode Island[c]
South Carolina[a]
South Dakota[c]
Tennessee[c]
Texas[a]
Virginia[a]
Washington[d]
West Virginia[a]
Wisconsin[a]
Wyoming[a]

Percent of 1975 Enrollment Within Group II		
Total	Public	Private
61.5%	63.7%	51.9%

III. The decrease in the number of 18-year-olds should be offset by substantial in-migration of freshman students in one state.

Vermont[c]

Percent of 1975 Enrollment Within Group III		
Total	Public	Private
.3%	.2%	.7%

IV. The decrease in the number of 18-year-olds is not expected to be offset by the in-migration of freshman students in two states.

Iowa[c]
Kentucky[a]

Percent of 1975 Enrollment Within Group IV		
Total	Public	Private
2.3%	2.2%	3.1%

V. Nine states are likely to experience a decrease in the number of 18-year-olds and also to continue to serve as net exporters of freshman students; this combined effect should decrease enrollment.

Arkansas[d]
Connecticut[d]
Illinois[d]
Minnesota[d]
New Jersey[d]
New York[d]
North Dakota[d]
Ohio[d]
Pennsylvania[d]

Percent of 1975 Enrollment Within Group V		
Total	Public	Private
28.4%	25.9%	38.7%

---

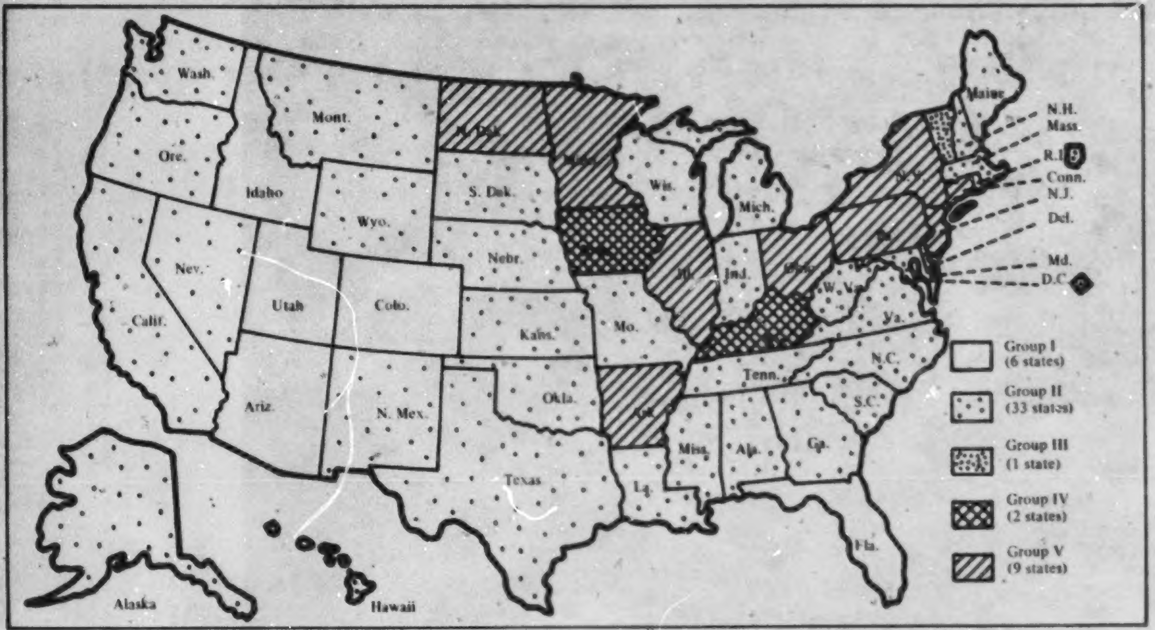
[a] Most of the freshmen migrating into the state were attending public institutions in 1975.
[b] Freshmen migrating into the state were about evenly split between public and private institutions in 1975.
[c] Most of the freshmen migrating into the state were attending private institutions in 1975.
[d] These states have historically served as net exporters of freshman students.

Source: Policy Analysis Service, American Council on Education, 1977.

Exhibit 7

IMPACT OF PROJECTED POPULATION SHIFTS AND MIGRATION TRENDS OF STUDENTS ON ENROLLMENT OF TRADITIONAL-AGE FRESHMAN: 1975-1985

NOTE: See Exhibit 6 for explanation of groups.


Wash.
Mont.
N. Dak.
Minn.
Maine
N.H.
Mass.
R.I.
Conn.
N.J.
Del.
Md.
D.C.
Ore.
Idaho
Wyo.
S. Dak.
Wis.
Mich.
N.Y.
Pa.
Iowa
Nebr.
Nev.
Utah
Colo.
Ill.
Ind.
Ohio
W. Va.
Va.
Ky.
Calif.
Kans.
Mo.
Tenn.
N.C.
S.C.
Okla.
Ark.
Ariz.
N. Mex.
Miss.
Ala.
Ga.
Texas
La.
Fla.
Alaska
Hawaii
Group I (6 states)
Group II (33 states)
Group III (1 state)
Group IV (2 states)
Group V (9 states)

NOTE: See Exhibit 6 for explanation of groups.

SOURCES: Policy Analysis Service, American Council on Education based on U.S. Bureau of the Census, *Current Population Reports*, P-21 and P-25 Series, and National Center for Education Statistics, unpublished data from the 1975 Residence and Migration Study.

TABLE I-1

STATE HIGHER EDUCATION ENROLLMENT PROJECTIONS
ALL INSTITUTIONS

YEAR	HEADCOUNT		FTE	
1975	657,891		440,726	
1976	666,880		439.923	
1977	671,231		434,279	
1978	661,969		425,447	
	LATEST	TREND	LATEST	TREND
1979	671,130	669,598	428,947	425,466
1980	677,324	668,741	431,549	420,412
1981	680,738	665,591	431,880	413,615
1982	683,399	663,911	431,518	407,164
1983	682,090	663,053	427,879	404,220
1984	678,728	660,155	422,777	399,558
1985	674,669	656,560	417,258	394,418
1986	668,764	651,026	411,141	388,625
1987	664,924	648,131	407,102	385,044
1988	666,359	650,622	407,343	385,531
1989	665,518	652.667	405,880	385,905
1990	659,999	650,152	400,314	382,307
1991	648,561	639,825	391,058	373,704
1992	638,599	629,983	382,674	365,199
1993	631,238	622,970	376,332	359,074
1994	626,569	619,290	372,335	355,763
1995	626,937	620,302	372,149	355,829

Figure I-1

TOTAL STATE HEADCOUNT ENROLLMENT PROJECTIONS

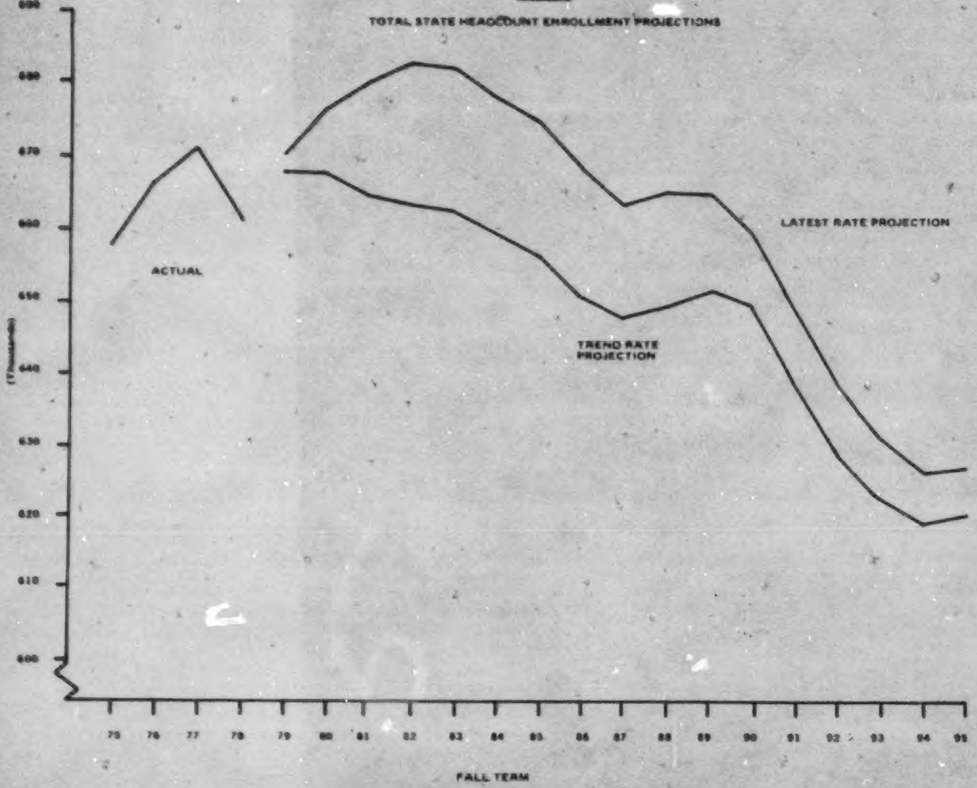
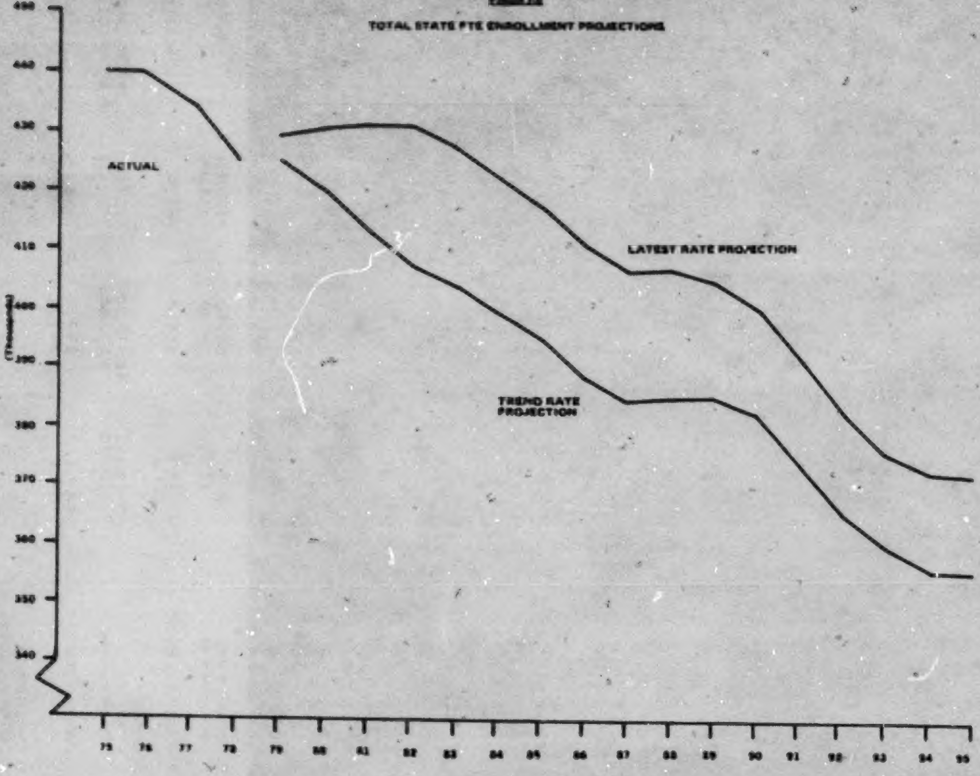


Figure [illegible]

TOTAL STATE FTE ENROLLMENT PROJECTIONS



PROFILE OF THE COLLEGE OF ANYWHERE
1980-2000

			CHANGE	
ITEM	1980	2000	%	AMOUNT
1. Enrollments	1,000	750	-25%	(-250)
	1,000	814	-18.6%	(-186)
2. Tuition (5% increase per year)	$3,000	$7,959	+165.3%	(+$4,959)
3. Budget (5% increase per year)	$5 M	$13.3 M	+166%	(+$8.3M)
4. Gifts (5% increase per year)	$.5 M	$1.3 M	+160%	(+$.8 M)
5. Utilities (+10%)	$.6 M	$4.030 M	+571.6%	(+3.43 M)
(+5%)	$.6 M	$1.59 M	+165%	(+.991 M)
6. Size of Faculty				
15/1 Student	67 F.T.	50 F.T.	-25%	(-17 F.T.)
Faculty Ratio	67	54 F.T.	-18.6%	(-13 F.T.)

OVERVIEW OF THE COLLEGE OF SOMEWHERE
1958-1978

			INCREASE	
ITEM	1958	1978	%	AMOUNT
1. Enrollments				
Day	826	1575	+90.6%	+749
Evening	956	1033	+ 8.05%	77
Continued Education		375		
Contract		48		
TOTAL	1782	3031	+70%	+1,249
2. Tuition a year	$300	$2980	+893.3%	$2680
Activity Fee	17.50	90	+414.3%	72.50
3. Room and Board	$175	$1610	+820%	+$1,435
4. Budget				
Income	$912,111	$8,775,000	+862%	(+7,862,889)
Expenditures	910,988	8,695,000	854.4%	(+$7,784,012)
5. Size of Faculty	64 F.T.	95 F.T.	+48.4%	+31
	10 P.T.	45 P.T.	+350%	+35
6. Departments				
Offering Majors	21	21	0	0
Offering Minors	5	0	-100%	-5
TOTAL	26	21	-19.2%	-5
7. Majors offered	21	35	.666%	†14
8. Minors offered	5	0	-100%	-5

EXECUTIVE FINANCIAL SUMMARY
COLLEGE OF UTOPIA
(Copyright, JMA 1978)

Selected Financial Ratios (Median Institutions)	Your Institution				UCC 1977		NS 1977	
	74	75	76	77	GRP 1	All	La I	All
Asset & Liability Ratios								
Total Net Liabilities % Total Net Assets	15	11	11	11	14	20	7	17
Internal Debt % Total Unres Fund Balance	30	109	108	102	9	8	18	12
Current External Liab % Current Liquid Assets			46	71	81	116	33	69
Curr Ext & Plant Liab % Curr Liq & Plant Assets			61	84	98	114	45	80
Curr Ext & Plant Liab % Curr Liq Plant & RSV Assets			22	20	38	56	30	33
Curr Liq Assets % Unres Curr Fund Balance			63	71	29	16	151	114
Working Capital Ratio								
Unrestricted funds balance % E&G Expenditures	48	46	30	23	22	6	49	22
Plant Debt Ratios								
Current Ext Plant Liab % E&G Expenditures			3	3	4	4	8	4
Current Ext Plant Liab % Unres Funds Balance			9	11	5	4	6	6
Operating Net Ratios								
Net Total Revenues % Total Revenues	6	5	4	3	0	1	2	2
Net Educational & General Rev % E&G Revenues	8	5	5	3	-1	2	3	2
Net Auxiliary Revenues % Auxiliary Revenues	9	3	0	0	0	3	3	1
Net Aid Grant Rev % Restricted Aid Grant Revenues	-55	-48	-29	0	19	-5	-14	-3
Contribution Ratios								
Tuition and Fees % E&G Expenditures	76	75	73	74	65	61	64	63
Federal Govt Rev % E&G Expenditures	7	4	6	5	4	9	3	7
State Govt Rev % E&G Expenditures	0	1	1	1	1	0	0	0
Gifts & Grants Applied % E&G Expenditures	13	13	14	13	13	16	16	14
Endowment Income Applied % E&G Expenditures	8	7	6	6	7	4	11	3
E&G Revenues % E&G Expenditures	106	106	106	103	99	102	103	102
FTE Freshman % Freshman Apps Received				18	38	48	38	42

* NS=National Sample LA 1=Liberal Arts Colleges I

INDEX OF:			BASE YEAR	
Total Revenues	74	75	76	77
Your Inst	87	91	100	106
UCC GRP 1	89	94	100	108
UCC All	87	94	100	107
NS LA 1	87	92	100	112
NS All	81	[illegible]	100	109
Total Expenditures				
Your Inst	83	90	100	108
UCC GRP 1	88	94	100	108
UCC All	88	95	100	108
NS La 1	86	93	100	109
NS All	82	91	100	109
Total Educ & General Expenditures				
Your Inst	83	90	100	106
UCC GRP 1	88	94	100	107
UCC All	89	95	100	108
NS LA 1	86	93	100	109
NS All	82	91	100	109
Unrestricted Funds Balance				
Your Inst	133	136	100	82
UCC GRP 1	107	110	100	40
UCC All	113	108	100	69
NS LA 1	95	98	100	108
NS All	93	97	100	103
Net Assets				
Your Inst	100	96	100	102
UCC GRP 1	94	95	100	104
UCC All	95	96	100	103
NS LA 1	94	95	100	107
NS All	92	95	100	105
Total Liabilities				
Your Inst	96	110	100	93
UCC GRP 1	85	97	100	103
UCC All	94	98	100	101
NS LA 1	106	99	100	98
NS All	78	88	100	103

INDEX OF:			BASE YEAR	
Prior Year FI	73	74	75	76
Your Inst	100	99	100	96
UCC GRP 1	97	98	100	98
UCC All	96	98	100	98
NS LA 1	98	98	100	102
NS All	94	96	100	101

				BASE YEAR	
FTE Freshman	73	74	75	76	77
Your Inst					
UCC GRP 1	93	104	96	100	104
UCC All	86	91	95	100	98
NS LA 1	96	98	95	100	102
NS All	97	98	100	100	105

				BASE YEAR	
Freshman Admission Offers	73	74	75	76	77
Your Inst					
UCC GRP 1	98	103	97	100	113
UCC All	83	85	94	100	95
NS LA 1	99	96	97	100	104
NS All	94	95	97	100	105

				BASE YEAR	
Freshman Applications	73	74	75	76	77
Your inst.					
UCC GRP 1	104	109	102	100	140
UCC All	93	93	104	100	103
NS LA 1	101	101	98	100	103
NS All	94	96	96	100	102

SECTION IV
Contributors

The Twenty-Three Participating Denominations

African Methodist Episcopal Church
American Baptist Churches in the U.S.A.
American Lutheran Church
Christian Church
Christian Methodist Episcopal Church
Church of the Brethren
Church of Christ
Church of God
Church of Jesus Christ of Latter-day Saints
Church of the Nazarene
The Episcopal Church
Free Methodist Church of North America
Lutheran Church in America
Lutheran Church, Missouri Synod
Mennonite Church
Presbyterian Church, U.S.
Religious Society of Friends
Roman Catholic Church
Seventh-day Adventists
Southern Baptist Convention
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